U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 07Mar2002

CASE NO.: 2000-LHC-190

OWCP NO.: 18-64021

In the Matter of:

JERRY WERELIUS
Claimant

v.

CONTINENTAL MARITIME OF SAN DIEGO
Respondent

and

MAJESTIC INSURANCE COMPANY
Carrier

Appearances:

Jeffrey M. Winter, Esquire
For the Claimant

MaryAnn Shirvell, Esquire
For the Respondent and Carrier

Before: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER

The above-captioned claim arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act"or "LHWCA"), The claim is brought by Jerry Werelius (hereinafter "Claimant") against Majestic Insurance Company (hereinafter "Carrier") and Continental Maritime of San Diego (hereinafter together with the Carrier as "Respondents").

PROCEDURAL HISTORY

The above-captioned claim was forwarded to the Office of Administrative Law Judges on October 18, 1999. Administrative Law Judge Alfred Lindeman issued a Notice of Calendar call setting the claim for June 10, 2000 in Long Beach, California. On March 8, 2000, Claimant requested that the claim be transferred to San Diego for a formal hearing. On March 10, 2000 Judge Lindeman granted the request. A second Notice of Calendar Call was issued on June 5, 2000, setting the hearing for August 7, 2000 in San Diego, California. The hearing was continued on July 10, 2000 because Claimant's treating physician recommended that Claimant undergo a further surgical procedure.

Administrative Law Judge Jeffrey Tureck issued a Notice of Calendar Call on October 5, 2000, setting the above-captioned claim to be heard between December 11, 2000 and December 15, 2000. A continuance was requested because Claimant had reached maximum medical improvement and was scheduled for evaluation by a pain management specialist. Thus, the parties contended that further discovery was necessary. The continuance was granted by Judge Tureck on November 21, 2000. Another Notice of Calendar was issued by Administrative Law Judge Daniel DiNardi on March 14, 2001 for hearings to begin on June 11, 2001. Judge DiNardi assigned the above-captioned claim to the undersigned on April 3, 2001.

A hearing was conducted in San Diego, California on June 12 & 19, 2001 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing Claimant's Exhibits 1 through 7, Respondents' Exhibits A through M, and Administrative Law Judge's Exhibits 1 through 3 were received into evidence.[1] Post-hearing, this Court admitted to the record the April 8, 1998 Decision and Order of Judge Alexander Karst pertaining to Claimant.[2] Judge Karst's decision has been marked as Administrative Law Judge's Exhibit 4. The parties also submitted post-hearing briefs and reply briefs. All of this evidence has been made part of the record.

UNCONTESTED ISSUES

Neither party has submitted any evidence regarding the following issues. Therefore, I find that:

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[1] The following abbreviations have been used in this opinion: RX = Respondents' exhibits; CX = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

[2] Both parties make reference to Judge Karst's April 8, 1998 Decision and Order. As such, this Court determined that the admission of the decision to the record in this matter was necessary for the sake of thoroughness.

1.) This claim is covered by the Longshore and Harbor Workers' Compensation Act.

2.) Claimant was injured within the scope and course of his employment with Respondents on October 3, 1996.

3.) An employer/employee relationship existed at the time of Claimant's injury.

4.) Respondents were timely informed of Claimant's injury.

5.) Respondents filed a timely controversion to Claimant's claim for benefits under the Act.

6.) Claimant was paid temporary total disability benefits by Respondents for the time period from October 4, 1996 through October 2, 2000.

7.) Claimant's average weekly wage at the time of the injury was $514.00, for a compensation rate of $342.67.

ISSUES

1.) Whether Claimant continues to be temporarily totally disabled for the time period that he is under the care of Dr. Strauser.

2.) The nature and extent of Claimant's disability.

3.) The amount of Claimant's post-injury wage earning capacity.

4.) Whether Claimant attorney is entitled to fees and costs.

5.) Whether Respondents are entitled to credit for the overpayment of disability benefits.

6.) Whether Respondents are entitled to Section 8(f) relief.

Findings of Fact and Conclusions of Law

Background

Claimant was employed by Respondents as an Outside Machinist at the time of the accident in this claim. Claimant was injured on October 3, 1996 when he was struck by a flatbed truck operated by one of Claimant's co-workers. Claimant has received treatment from various physicians for the

injury sustained. Claimant was paid temporary total disability benefits from October 4, 1996 through October 2, 2000.

Hearing Testimony

Claimant's Testimony

Claimant testified at the formal hearing in the above-captioned matter. Claimant stated that since the time of his prior hearing, he has undergone two post-anterior fusion. These surgeries occurred in August, 1998 and November, 1999. (TR 106). Claimant also stated that while in the hospital in November, 1999, he suffered a myocardial infarction. (TR 106). Claimant stated that in the process of these treatments, he has been treated by Drs. Maguire, Gordon, Strauser, and Dodge. (TR 107).

Claimant testified that Dr. Maguire serves as Claimant's orthopedic surgeon, primary care physician, and cardiologist. (TR 107). Dr. Maguire has recommended to Claimant that the pedicle screws placed in the right side of Claimant's back, as part of the second post-anterior fusion, be removed. (TR 109). Claimant has expressed that he does not wish to undergo such a procedure. (TR 109). Dr. Maguire then referred Claimant to a pain management specialist. Claimant came to be treated by Dr. Strauser for pain management in January, 2001. (TR 108). Dr. Strauser has treated Claimant by prescribing Methadone and Nortriptyline. (TR 108). Prior to the hearing, Claimant had last seen Dr. Strauser on June 18, 2001. (TR 108).

Claimant testified that his hobbies include walking about 4 or 5 miles, riding a bicycle 4 to 6 miles, and completing the crossword puzzles. (TR 110 & 147). Claimant also engages in a stretching routine coupled with general exercise when his back pain permits such activity. (TR 117). Claimant tries to jog, but is unable to engage in this activity because he experiences pain.[3] (TR 159). Claimant stated that since the time of the prior hearing, he had gained a significant amount of weight. However, Claimant was able to lose this weight because Dr. Strauser has managed Claimant's pain thus permitting Claimant to engage in cardiovascularly stimulating activities. (TR 110). Claimant described his physical abilities to Dr. Strauser as being "strong as an ox," but Claimant testified that he is unable to lift 25 to 30 pounds. (TR 149).

Claimant went on to testify that he has "good days and bad days." (TR 119). On the good days, Claimant is able to engage in a variety of activities, but on bad days, Claimant does not leave his home. (TR 119). Claimant was prescribed the use of a cane by Dr. Maguire although he has not been told recently to use the case by any physician. (TR 149). Claimant also stated that he uses a cane to

[3] Claimant states that he is able to jog across a street or very short distances. (TR 159).

walk and that he uses it everyday. (TR 119). Claimant believes that he can walk short distances without the cane, but without the cane, his "gait is rather exaggerated and [he] fatigues rather easily." (TR 120).

Claimant stated that he has been seeking employment since November, 1999. (TR 111). Claimant said that he was looking for work close to his home, "tending bar, things that I'm familiar with." (TR 111). Claimant testified that he believed that he had secured a position with "a subsidiary of SPAWARS" but "[t]hat job fell through." (TR 111). Claimant stated further that the employer had "liability concerns" because of his physical limitations. (TR 111).

Claimant stated that he has been attempting to obtain employment as a bartender at local bars, but that there are presently no openings available. (TR 128). Claimant stated that he does not believe that he is capable of performing full-time work, but that a part-time position might better suit his physical capabilities. (TR 112). Claimant has assessed his own abilities and believes that he cannot return to full time work because he does not believe that he can be "competitive" because when he experiences one of his "bad days," he would not be able to report to work. (TR 121).

Claimant has met with a Department of Labor vocational rehabilitation counselor on two occasions, and he intends to continue to meet with this counselor. (TR 112). Claimant testified that he wishes to return to the workforce because he is bored and because he needs the money. (TR 120). In pursuit of this goal, Claimant purchased a home computer and is currently learning how to operate the software. (TR 120).

Claimant believes that he is capable of performing production assembly jobs. (TR 155). Claimant does not recall telling anyone that he was going to hold off on seeking employment until his compensation claim was resolved. (TR 157). However, Claimant does recall telling Mr. Katzen that wished to wait until his claim was resolved to seek employment. (TR 157). Claimant later clarified that he wished to wait to seek full-time employment until after this claim was resolved because once the claim is resolved he will not be "bothered with all the interruptions that are currently going on." (TR 161).

Claimant underwent a functional screening evaluation ordered by Joyce Gill. (TR 112). Claimant understood that this evaluation would determine Claimant's abilities as they related to his physical condition. (TR 113). Claimant related to Ms. Gill that he is able to lift a 24 pound bag of charcoal. (TR 149). Claimant does not recall any activities during the functional screening evaluation that required him to twist at the waist. (TR 122). The functional screening evaluation did involve stooping and squatting to retrieve items from the floor. (TR 122). This activity caused Claimant discomfort, increased pain, and difficulty. (TR 122). The functional screening evaluation was conducted over 3 days, 6 hours per day. (TR 123). Claimant was unable to complete the full three

days, and was only able to complete 4 hours on the final day. (TR 123). Claimant believed that this evaluation determined that he is unsuited to full-time work. (TR 115).

While serving in the United States Navy, Claimant underwent a color discrimination test. (TR 117). Claimant testified that he lacks color discrimination, as was confirmed by testing performed by Far West Vocational Testing. (TR 117). Claimant wanted to be assigned to be an electronics technician while in the Navy, but that he was unable to achieve such an assignment because of his inability to differentiate colors. (TR 141). Claimant was then assigned to be a machinist. (TR 141).

Claimant went on to discuss his meeting with Mr. Katzen. (TR 118). Claimant also stated that he does not feel that he is well suited for telemarketing work. (TR 118). Claimant stated that he worked as a telemarketer for 3 days at one point and felt that the job was not appropriate for him because he "couldn't lie to people. Couldn't talk to them on the phone like that. [He] couldn't sell what they wanted [him] to sell." (TR 118).

Claimant self-medicates with his Methadone. (TR 124). The dosage of the Methadone has been increased by Dr. Strauser on three occasions since Claimant came under Dr. Strauser's care. (TR 124). Claimant stated that the Methadone causes him increased nausea and sweating. (TR 125). Claimant testified that he is unable to sit or stand in the same position for any extended period of time because he experiences cramping in his back. (TR 126). Claimant stated that he is most comfortable while lying on his side with pillows between his knees. (TR 126).

Claimant testified that he quit smoking cigarettes in April, 1997, and that he occasionally endulges in a cigar. (TR 110). However, Claimant later testified that he quit smoking cigars "recently." (TR 150). Claimant denies alcohol use, but does admit to occasional use of marijuana. (TR 151). Claimant is aware that his use of marijuana could affect his ability to gain employment. (TR 151).

Roy Katzen

Mr. Roy Katzen met with Claimant for the purpose of a labor market survey and testified to his findings. Mr. Katzen is a private vocational rehabilitation counselor and a certified rehabilitation counselor. (TR 11). Mr. Katzen is also certified by the State of Oregon and the Office of Workers' Compensation Programs to provide direct vocational services, as well as being certified to administer the general aptitude test battery. (TR 11). Mr. Katzen began counseling in 1979 and became a private rehabilitation counselor in 1983. (TR 12). Mr. Katzen has focused his practice on longshore claims since 1990. (TR 12). Mr. Katzen stated that he provides case management services which include working on a long term basis with the injured worker and helping to direct the injured worker into appropriate employment. (TR 12).

Mr. Katzen went on to discuss Claimant's employment as an outside machinist. (TR 14). Mr. Katzen bases his assessment of Claimant's employment on his observation of numerous shipyard

facilities, including Respondents' shipyard on 4 occasions. (TR 14). Mr. Katzen explained that he first began work on Claimant's case in December, 2000 when a vocational evaluation and labor market research were completed to determine Claimant's wage earning capacity. (TR 15). Mr. Katzen testified that he begins the process by gaining insight into the labor market as it exists. (TR 16).

Mr. Katzen stated that he first examines the data available to determine what type of work is suitable for the injured worker, looks at the labor market, the job descriptions, and the availability of jobs. (TR 16). In rendering his opinion, Mr. Katzen reviews documentation that include the medical records, depositions, prior vocational reports, labor market research, job descriptions, and meetings with the injured worker. (TR 16-17). Mr. Katzen did not conduct comprehensive testing because Mr. Katzen felt that the 1999 testing was sufficient to reach any conclusions. (TR 17).

Mr. Katzen reviewed the testing completed Mr. Reveras and quoted from that report that Claimant possesses the skills to transition into other occupations easily. (TR 19). Mr. Katzen noted that Claimant performed well on the tests measuring reasoning, language, and mathematic skills. (TR 19). Mr. Katzen reviewed Claimant's VAB Test which showed that Claimant exhibited the highest level of general intelligence and that Claimant's verbal aptitude, informed perception, clerical perception, spacial relations, finger dexterity, and manual dexterity were rated as average or above average. Claimant's color discrimination abilities ranked below average. (TR 20).

Mr. Katzen met with Claimant for 2 hours on December 27, 2000. (TR 20). Mr. Katzen compiled evidence concerning Claimant's medical condition at the time of the interview, Claimant's assessment of his physical capabilities, Claimant's educational background, work history, and any other factors that impact Claimant's employability. (TR 21). Mr. Katzen also met with Claimant on four other occasions, January 16, 2001, February 13, 2001, February 23, 2001, and March 6, 2001.

In determining Claimant's transferable skills, Mr. Katzen first consulted the *Dictionary of Occupational Titles* and then completed a transferable skills analysis using computer software.[4] (TR 22). Using these two resources, Mr. Katzen determined that Claimant should be placed in the light work range based on Claimant's work history and physical restrictions. (TR 22). The computer program that Mr. Katzen employs provides a list of occupations that fall within Claimant's work history and work restrictions. (TR 22). Mr. Katzen's work produced jobs that fall within the "light productionist, assembly areas." (TR 22).

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[4] This court took official notice of the *Dictionary of Occupational Titles* at the time of the hearing in this matter. (TR 195).

Mr. Katzen determined that Claimant's abilities and restrictions placed Claimant within the light work category. (TR 23). This category was described by Mr. Katzen as "occasional 20 pounds lifting, 10 pounds lifting, more frequently general physical demands, but not exerting himself to a great extent and energy output." (TR 23). In determining that Claimant falls in this category, Mr. Katzen relied on Dr. Maguire's October, 2000 report and deposition, Dr. Dodge's report, and Dr. Strauser's deposition. (TR 23). Mr. Katzen determined that no doctor had limited Claimant to part-time work and Drs. Maguire and Strauser found Claimant to be capable of an 8 hour work day and a 40 hour work week. (TR 24).

Mr. Katzen discussed the limitations placed on Claimant by Dr. Maguire. Dr. Maguire indicated that Claimant was capable of lifting up to 20 to 25 pounds. (TR 89-90). Dr. Maguire was most concerned that Claimant be able to alternate between sitting and standing in the process of a work day. (TR 90). Dr. Maguire also indicated that Claimant would be capable of performing the requirements of a position if the job did not involve repetitive bending and limited Claimant's lifting from the floor to waist level to a maximum of 10 pounds. (TR 90).

Mr. Katzen's next step in preparing the labor market survey was to examine the employment statistical data from the California Employment Development Department. (TR 24). The statistics provided by this department chart the work available for different job categories. (TR 25). Mr. Katzen reviewed the 1998 statistical data considering Claimant's restrictions.[5] (TR 25). Mr. Katzen found that 22,000 jobs were available in San Diego County that met Claimant's restrictions and experience. (TR 25). Mr. Katzen then consulted the classified advertisements in the local newspapers and individual company web sites. (TR 25).

Mr. Katzen stated that the trend with light duty, assembly positions is that there is an "enormous amount of hiring that's being done through private employment agencies." (TR 25). Mr. Katzen explained that these employment agencies usually place people on a "probationary period" and if the employee performs well, then a full-time job is offered. (TR 26). Mr. Katzen clarified that the general category of "light work" alone would not be sufficient to meet Claimant's requirements. (TR 68). It is necessary to review the specific restrictions of any job to determine if Claimant is able to perform the required elements. (TR 68).

Mr. Katzen identified jobs that were available at the time of the report in Claimant's geographical area and physical restrictions. (TR 26). Based on Claimant's work history, educational level, and basic transferable skills, Mr. Katzen found that Claimant would enter the workforce above

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[5] The 1998 data was the most recent statistical evidence available at the time of Mr. Katzen's report. (TR 24).

entry level, "but there are, in fact, other positions beyond that level for which he may very well qualify."[6] (TR 27).

Mr. Katzen identified jobs for Claimant on 3 different occasions. (TR 28). Prior to the end of February, 2001, Mr. Katzen identified 10 employers, 9 of which had job openings that meet Claimant's qualifications and 7 that meet Claimant's physical restrictions. (TR 28). The 10 employers and the open positions are summarized below.

1. Savar Consulting

Savar Consulting is an employment agency. This agency places workers on a 90 day temporary basis with the intent for full time hiring. Several employers had jobs available that met Claimant's physical limitations and qualifications. Mr. Katzen indicated that the jobs available through Savar Consulting permitted Claimant to alternate between sitting and standing in the process of a day. The starting wage for entry level employment in 1996 was between $7.00 and $8.50 per hour with that amount rising when the employee is hired to full time employment. (TR 29-30 & 91).

2. Onsite

Onsite is an employment agency that had jobs available in Claimant's physical limits and meeting Claimant's experience. This employer emphasized that prior military experience would be a bonus. Military background in addition to mechanical skills would enhance the worker's employability, however, it was not definitively determined that Claimant would be hired at anything above an entry level position. The wages in 1996 were between $7.00 and $10.00 per hour. The salary is dependent upon the experience of the individual. Mr. Katzen would expect Claimant to have earned $9.00 per hour with his experience. (TR 31&73).

3. HM Electronics

HM Electronics had positions available where Claimant would have the ability to change from a sitting to standing position in the process of a day. There were jobs available that met Claimant's physical restrictions. Claimant would be able to enter this work environment above an entry level position and would have the ability to advance. The 1996 wages were between

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[6] The skills to which Mr. Katzen refers are the skills that Claimant gained while working as an outside machinist. These skills include: "blueprint reading; close tolerance measurement using devices like micrometeres and calibers and dial indicators, the use of different types of tools; the knowledge of different types of tools; the knowledge of different types of systems – hydraulics, electrical, mechanical systems." (TR 27).

$5.00 and $6.00 per hour. Mr. Katzen determined that Claimant would begin in the $7.00 to $8.00 range with the ability to rise to the $9.00 to $11.00 range. (TR 33-35).

4. Adecco

Adecco is an employment agency that had several jobs available. One job discussed by Mr. Katzen was working with lap top computers. This job would entail lifting 20 pounds. The jobs available were permanent or long term temporary positions. Mr. Katzen estimates that the wages in 1996 were at about $7.00 hour and the present wages start at $8.50 per hour. (TR 36-37).

5. Socal

Mr. Katzen found that the jobs available at Socal were unsuitable for Claimant.

6. Express Personnel

Express Personnel is engaged in electronic and mechanical assembly. Mr. Katzen notes that the jobs available through Express Personnel provide an environment where Claimant could alternate sitting and standing during the day and would require a maximum lifting of

20 pounds. Mr. Katzen does not have access to the wages for 1996, but he estimates that the wages were between $5.50 and $6.00. (TR 38-39).

7. Eastridge

Eastridge had jobs available that would require Claimant to lift 10 to 15 pounds, assemble mechanical devices, operate machines, and pack assembly. Positions with Eastridge required minimal to no previous experience. Mr. Katzen stated that some experience in mechanical work would be helpful in Claimant securing a job above entry level and would provide an increased earning potential. Jobs were available that would provide Claimant the opportunity to alternate sitting and standing. Mr. Katzen found that entry level positions were available within Claimant's limitations. The 1996 wages for these jobs would be between $5.15 and $5.75 per hour. However, Mr. Katzen opined that with Claimant's experience, the 1996 wages would have been between $6.50 and $8.00 per hour. (TR 39-41).

8. Remec

Remec is an organization that manufactures electronic equipment. Remec had jobs available that met Claimant's physical restrictions and were within Claimant's skill level. Claimant would have the ability to earn more because Claimant has the ability to read blueprints and perform quality control. Jobs were available where Claimant would have the ability to alternate between sitting and standing and lifting is limited to 5 pounds. Mr. Katzen did not have access to the 1996 wages, but estimated that the wages would have been between $6.00 and 7.00 per hour.

The wages at the time of Mr. Katzen's report were between $6.25 and $8.00 per hour. (TR 42-43).

9. Sony/Adecco

Because the jobs require a significant amount of standing, Mr. Katzen determined that the jobs available with Sony were beyond Claimant's capabilities. Adecco manufactures golf clubs. The jobs at Adecco did not require lifting over 10 pounds, and sitting and standing could be alternated. Mr. Katzen determined that the Adecco positions would be appropriate for Claimant. Mr. Katzen noted the 1996 wages to be between $6.50 and $7.00. The current wages were approximately $8.00 per hour. (TR 43-44).

10. Industrial Staffing

Industrial Staffing is an agency that offers jobs that are most often temporary-to-hire positions. Industrial Staffing had positions available in mechanical or mechanical and electrical assembly. Industrial Staffing had positions available within Claimant's restrictions. Mr. Katzen noted that prior mechanical skills would be helpful and required for some positions. Mr. Katzen noted that some of the available jobs would permit Claimant to alternate sitting and standing. Mr. Katzen opined that the 1996 wages would be between $6.50 and $8.50 per hour. The current wages were between $8.00 and $10.00 per hour. (TR 44-46 & 77).

Since the time that Mr. Katzen authored the report that detailed these 10 employers, Mr. Katzen has had further contact with the 10 employers. (TR 46). At the time of the more recent contact, HM Electronics, Remec, Eastridge, and Industrial Staffing all had positions available meeting Claimant restrictions and utilizing Claimant's skills. (TR 46-48). Express Personnel stated that while no positions were available at the time of the contact, positions were anticipated to be available in the middle of May, 2001. (TR 47).

Mr. Katzen stated that the employers with positions that meet Claimant's requirements had multiple positions available. (TR 65). Mr. Katzen is unable to determine the exact wage that would be offered to Claimant because the employers would need to meet with Claimant to discuss his experiences to determine the wage that Claimant would be offered. (TR 70). Additionally, Mr. Katzen contacted the following 2 employers:

1. Carvin Guitars

Carvin Guitars had 2 positions available in its assembly department. The positions would provide Claimant with the ability to alternate between a sitting and standing position during the work day. This accommodation is available because the work is done at a "counter height" with the employee sitting in a "captain's chair." The 1996 wages for an entry level position were $5.50 per hour. The current wages for these positions are $7.50 at the entry level and $15.00 for a more technically skilled employee. (TR 48-50).

2. Chem-tronics

Chem-tronics "fabricates and repairs aircraft and aerospace components." Mr. Katzen found that the lifting required in an entry level position was beyond Claimant's abilities. However, Mr. Katzen determined that Claimant could perform the requirements for the "hand finishing" position. Openings were available for the "hand finisher" position in April, 2001, but not in May, 2001. (TR 50-51).

Mr. Katzen went on to explain that he searched for jobs for Claimant that were at "bench level." (TR 51). Also, Mr. Katzen indicated that none of the jobs examined for Claimant included repetitive lifting from the floor level to the waist level, no repetitive twisting, and no repetitive bending. (TR 52).

Mr. Katzen stated that when he contacted each employer he spoke about Claimant's experiences and limitations. (TR 52). Mr. Katzen read a prepared statement that reads as follows:

> [Claimant] is a 46 year old high school graduate. He has 10 years of experience in the United States Navy, with training as an outside machinist, including hydraulics and propulsion engine systems. Following discharge from the military, he has seven years of additional experience as an outside machinist in shipyard settings. This includes reading blueprints and utilizing some machine tools. In terms of physical capacities, he's able to lift 15 to
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> 20 pounds occasionally. He would be best alternating sitting and standing in a bench-type of occupation.

(TR 53).

Mr. Katzen also discussed the labor market survey prepared by Kathryn Melamed. (TR 54). Mr. Katzen found that the most appropriate job identified by Ms. Melamed was the telemarketer position. (TR 55). This position would allow for sitting and standing and there are always entry level positions available. However, Mr. Katzen believes that light assembly positions are more appropriate for Claimant because of Claimant's interests and previous work experience and the potential for Claimant to maximize his wage earning capacity. (TR 55).

Ms. Melamed's survey also identified cashier and parking lot attendant as potential jobs for Claimant. (TR 56). While Mr. Katzen found no physical reason why Claimant could not perform these jobs, Mr. Katzen determined that these occupations would not be best for Claimant because of potential difficulties with the necessary background review. (TR 56).

Mr. Katzen went on to explain that when attempting to place an injured worker in the workforce, the motivation of the worker is a consideration. (TR 57). Mr. Katzen characterized

Claimant's motivation as "up and down." (TR 58). In the early part of 2001, Claimant had indicated to Mr. Katzen that his function was increasing due to the treatment rendered by Dr. Strauser. (TR 58). Claimant informed Mr. Katzen that he was able to ride a bicycle up to 7 days per week and was considering returning to work in a position that Claimant had identified. (TR 58). Mr. Katzen went on to state that when he spoke with Claimant on March 6, 2001, Claimant informed Mr. Katzen that he was placing his job search on hold until the resolution of the above-captioned claim. (TR 59). At this time, Claimant continued to report an improvement in his symptoms. (TR 59).

In Mr. Katzen's final conversation with Claimant, Claimant indicated that he was no longer going to pursue the employment opportunity that he had identified, but that a part-time position might be a consideration. (TR 60). Mr. Katzen contacted Claimant regarding available part-time employment, but Claimant never returned Mr. Katzen's call. (TR 60). Mr. Katzen questions Claimant's motivation because Claimant pursued only the one opportunity and Mr. Katzen does not consider that to constitute a diligent job search. (TR 61-62).

Mr. Katzen testified that the average wages for a light assembly position on October 3, 1996 would be in the area of $6.50 to $7.00 per hour for a weekly wage of $260.00 to $300.00 per week. (TR 62). Mr. Katzen testified that a work capacity evaluation would be helpful in determining the most appropriate position for Claimant. (TR 78). Mr. Katzen then discussed his understanding of Dr. Strauser's treatment and evaluation of Claimant. (TR 81). Mr. Katzen believes that Dr. Strauser has noted an improvement in Claimant's overall function. (TR 81). Mr. Katzen also indicated that while Dr. Strauser would like to review the job description of any

potential job for Claimant, Dr. Strauser is "hopeful" that Claimant could return to a 5 day per week, 40 hour work week with certain limitations. (TR 82).

Mr. Katzen did not read Dr. Strauser's opinion to indicate that Claimant should be limited to part-time work. (TR 85). Mr. Katzen was unable, at the time of the hearing, to point to any part-time work that would be available to Claimant. (TR 86). However, Mr. Katzen did state that if part-time work were the goal for Claimant, that telemarketing would be a viable option because it would maximize Claimant's earning potential and meet the physical restrictions placed on Claimant by his physicians. (TR 86).

Mr. Katzen also discussed the potential effect of Claimant's methadone medication on his ability to work. (TR 88). In the short term, Mr. Katzen believed that if Claimant were to be absent from work shortly after being hired, due to the side effects from the medication, that such absence could affect Claimant's ability to obtain permanent employment. (TR 88).

Barbara Elliott testified at the hearing held in the above-captioned matter. Ms. Elliott is a certified rehabilitation counselor and an Office of Workers' Compensation Programs vocational rehabilitation counselor. (TR 164). Ms. Elliott has been a private vocational counselor since 1987 and began her own business in February, 1994. (TR 165). Ms. Elliott teaches vocational rehabilitation classes for the Education Association. These classes are a part of the certification process for claims examiner's and workers' compensation. (TR 165).

Ms. Elliott is certified to perform vocational rehabilitation before the Department of Labor. (TR 166). Ms. Elliott testified that the majority of her work is performed on claims within the State of California Workers' Compensation arena and that the last claim she evaluated under the LHWCA was before 1994. (TR 173). In rendering her assessment of Claimant's abilities, Ms. Elliott reviewed Dr. Maguire's deposition and permanent and stationary report; Dr. Dodge's report; Ms. Gills' vocational evaluation; Mr. Katzen's labor market survey, addendum, and additional report; and various other medical documentation. (TR 175).

Ms. Elliott testified that she reviewed Mr. Katzen's report and that no suitable alternative part-time employment was identified by Mr. Katzen. (TR 166). Ms. Elliott calls into question Mr. Katzen's assessment of Claimant's ability to recognize colors because Claimant has been diagnosed as suffering from color discrimination inadequacies. (TR 166-68). Based on Claimant's inability to discriminate between colors, Ms. Elliott determined that Claimant would not be well suited for a position as an electronics assembler. (TR 169). Ms. Elliott bases this determination on the fact that most electronics assembly require color-coded parts to be coordinated. (TR 169).

Ms. Elliott was then presented with pre-employment physical information in which Claimant underwent color distinction and form perception tests. (TR 180). Ms. Elliott was unaware of these tests. (TR 180). There appeared to be some inconsistencies in the testing performed to determine Claimant's color discrimination skills. (TR 181). Claimant scored above average on a test that required Claimant to coordinate shapes and contours of colored objects. (TR 181). However, Claimant scored below average on a color discrimination test. (TR 182). Ms. Elliott explained that Claimant would do better matching colors when they are attached to a contour because even if the color is matched incorrectly, the contours could be matched correctly to arrive at above average results. (TR 182).

Ms. Elliott testified that she has been personally involved in the job analyses for assembly jobs at Sony and Callaway Golf. (TR 169). In creating these job analyses, Ms. Elliott visits the jobsite and observes the work that is completed there. (TR 169). Ms. Elliott then examines the "minimum demands, maximum demands, duration, frequency, intensity, [and] repetition in order to be able to paint a picture of what a typical day is like." (TR 170). Ms. Elliott went on to explain that the job with Callaway Golf involved lifting from waist level to waist level, but that the job also involves twisting and lifting from waist level to overhead. (TR 170-71).

Ms. Elliott went on to discuss Claimant's functional rehabilitation evaluation. The evaluation is supposed to occur over a 3 day period, 6 hours each day. (TR 171). Claimant was unable to complete the final 2 hours of the evaluation. (TR 171). Because Claimant was unable to complete the evaluation, Ms. Elliott does not believe that Claimant is capable of performing full-time work. (TR 172).

Ms. Elliott discussed the factors measured in a functional capacity evaluation. (TR 187). Ms. Elliott explained that both subjective and objective factors are measured in a functional capacity evaluation. (TR 187). The validity of the evaluation would depend, at least in part, on the person's motivation and honesty. (TR 187). Ms. Elliott stated that she was not aware of exactly what was done during Claimant's functional capacity evaluation. (TR 189). Ms. Elliott stated further that she would need to review the evaluation to determine Claimant's ability to perform certain tasks or jobs. (TR 189).

Additionally, Ms. Elliott stated that Claimant undertaking Department of Labor sponsored vocational rehabilitation would preclude Claimant from engaging in full-time employment. (TR 172). Full-time employment would not be possible because the rehabilitation program would require Claimant's full cooperation and participation and would require Claimant to be available on a daily basis. (TR 172).

Ms. Elliott testified that she met with Claimant on one occasion in June, 2001. (TR 175). Ms. Elliott also testified that she has not met with any employers nor has she contacted any. (TR 175). Ms. Elliott explained that she was contacted by Claimant's counsel to review the labor market survey and offer an opinion. (TR 176). During her meeting with Claimant, Ms. Elliott did not perform any testing to measure Claimant's strengths or skills. (TR 179).

Ms. Elliott reviewed the initial vocational evaluation performed for the Department of Labor by Joyce Gill. (TR 177). Dr. Maguire completed a physical status form on May 14, 2001, which must be completed before a person is permitted to begin vocational rehabilitation with the Department of Labor. (TR 177). Ms. Elliott testified that she cannot recall whether Dr. Maguire limited Claimant to working less than a full 8 hour day, but that Dr. Maguire limited Claimant's lifting to 10 pounds and required that Claimant be permitted to alternate between sitting and standing and that Claimant not sit more than 2 hours and not stand more than 4 hours. (TR 178). Neither Dr. Maguire nor Dr. Strauser nor Dr. Dodge found that Claimant was incapable of working an 8 hour day. (TR 182).

Ms. Elliott found that Claimant could obtain employment as an entry level machinist. (TR 183). Ms. Elliott also found that telemarketing positions were available. (TR 183). The wages available in telemarketing vary from $12.00 per hour to commission only, with the average being between $8.00 and $9.00 per hour. (TR 183-84). In 1996, Ms. Elliott opines that the average wage for a

telemarketer would be between $6.00 and $7.00 per hour. (TR 184). Based on Claimant's skills, Ms. Elliott determined that Claimant could work as a telemarketer. (TR 185). A telemarketing position would allow Claimant to sit, stand, and move around as necessary. (TR 185).

Ms. Elliott stated that she would be concerned with Claimant working in any position where he would be required to meet quotas, such as a production assembly position. (TR 185). Ms. Elliott opined that Claimant's pain level would affect his ability to work. (TR 185). Ms. Elliott was also concerned that assembly type employment requires the employee to stand in generally the same position for the entire work day. (TR 185). Ms. Elliott was concerned that Claimant's ability to perform his work requirements could be affected by Claimant's need to take breaks or lie down. (TR 186).

Ms. Elliott then discussed Ms. Melamed's August 2, 1999 labor market survey. (TR 190). Ms. Elliott pointed out that this survey was completed prior to Claimant's second surgery. (TR 190). Ms. Elliott expressed concern over Claimant working as a parking lot attendant or cashier because both of those jobs might require Claimant to remain stationary for extended periods of time. (TR 190-91). Additionally, Ms. Elliott was "not sure" that Claimant possessed a personality appropriate for work as a telemarketer. (TR 191). However, Ms. Elliott agreed that there may be parking lot attendant positions that would fit within Claimant's restrictions. (TR 192).

Ms. Elliott would not approve Claimant for a production or assembly position nor any "job where [Claimant] had to stand in one position." (TR 192). If Claimant had to ability to "move around and stand and sit at will, to walk around," with no heavy lifting, no overhead reaching, and no twisting, and if Claimant was permitted to take rest breaks, then Ms. Elliott would approve of the job for Claimant. (TR 192).

Ms. Elliott stated that she had not contacted any of the employers listed on the labor market survey completed by Mr. Katzen. (TR 193). However, Ms. Elliott believes that the wages listed for the jobs in the survey are accurate and that the 1996 wages are accurately reflected in the survey. (TR 193). Ms. Elliott affirmed Mr. Katzen's statement that the general trend in the production and assembly industry is for individuals to be hired on a temporary-to-permanent basis. (TR 193).

David Cisek

Mr. David Cisek is a private investigator and owner of Spotcheck Investigations, and testified to his observations of Claimant. (TR 200). Mr. Cisek was retained to conduct surveillance of Claimant's residence. (TR 201). Mr. Cisek testified that he conducted surveillance of Claimant for 3 days beginning on June 12, 2001. (TR 201). During this surveillance, Mr. Cisek videotaped Claimant

walking from his home to the trolley station and boarding the trolley. (TR 201). Claimant was then observed disembarking the trolley and walking to his home. (TR 201).

On June 17, 2001, Claimant was filmed riding a bicycle from his home to the Chula Vista Marina and then returning home. (TR 202). Round-trip, Claimant traveled 7.8 miles. (TR 202). Mr. Cisek stated that he did not observe Claimant exhibiting any restrictions in movement during this bicycle ride. (TR 202). Mr. Cisek was unable to observed Claimant's facial expressions on this date. (TR 206). Mr. Cisek also conducted surveillance of Claimant on June 19, 2001. (TR 202). On this date Claimant was observed and videotaped traveling from his home to the hearing site, via trolley. (TR 203). Claimant was observed jogging approximately 110 yards to the trolley on this morning. (TR 203).

Claimant's Evidence

In support of his claim for benefits under the Act, Claimant submitted seven exhibits.

Dr. Carl Maguire

Claimant submitted the records and reports of Dr. Carl Maguire. (CX 1). Dr. Maguire's first report is dated April 1, 1998. This report indicates that a diskography was completed on March 12, 1998 at the L4-5 and L5-S1 level. Dr. Keith Kortman prepared a report for Dr. Maguire that indicated that Claimant's diskogram was normal at the L4-L5 level, but an injection at the L5-S1 level reproduced Claimant's low back pain. A CT scan that was taken after the diskogram injection confirmed that Claimant suffers from a degenerative disk at the L5-S1 level with "posterior annular penetration and anterior epidural contrast extravasation." It was recommended at this point that Claimant undergo an "interbody fusion at the L5-S1 level."

Dr. Maguire's next report is dated March 25, 1999. This was Claimant's seven month follow up after the completion of the anterior interbody fusion at L5-S1.[7] An x-ray of Claimant's back taken on this date showed that no change in position had occurred and there were early signs of anterior body bridging with progression toward fusion. However, Claimant continued to suffer from persistent pain across the lumbar spine that is relieved by lying down and moving slowly. Claimant reported that he is

[7] The operative reports of both the August 18, 1998 and November 3, 1999 surgeries are included in the record in this claim. (CX 2). The reports reflect the procedures completed and Dr. Maguire's pre- and post-operative diagnoses. As the information included in these reports is also recorded in Dr. Maguire's notes, the specifics of these documents need not be summarized.

able to sit for only a few minutes before experiencing discomfort. Dr. Maguire determined that Claimant was temporarily totally disabled at this point.

Dr. Maguire's next report is dated August 12, 1999 when Dr. Maguire was asked to review several job descriptions. Dr. Maguire reviewed the job descriptions for "cashier/parking lot attendant and telemarketer." Dr. Maguire felt that Claimant "should be capable of performing any type of these related occupations."

Dr. Maguire's next report pertaining to Claimant's condition is dated September 20, 1999. At this point, Claimant was 13 months post-surgery and "marginally better." Claimant reported continued back pain at this time with cramping and "bilateral leg pain spiraling across the anterior thigh region to knee level." Dr. Maguire noted that Claimant was using a cane at this time, and Claimant possessed limited range of motion in his lumbar spine. An x-ray taken on this date showed continued motion at the site of the fusion. This motion suggested to Dr. Maguire that pseudoarthrosis was present as a result of the interbody fusion. Dr. Maguire recommended at this time that Claimant undergo a posterolateral fusion at the L5-S1 level with the insertion of a pedicle screw. Dr. Maguire felt that this would improve Claimant's function and relieve his symptoms. Dr. Maguire believed that Claimant continued to be temporarily totally disabled at this point in time.

On October 4, 1999, Dr. Maguire noted that Claimant reported continued symptoms and limitation. Dr. Maguire again recommended the posterolateral fusion at L5-S1. On April 13, 2000, Claimant was 6 months post posterolateral spinal fusion at L5-S1 with the use of pedicle screws. Claimant continued to report lumbar spine discomfort. Dr. Maguire determined that Claimant's symptoms indicated a sciatic nerve root irritation. An x-ray taken at the time of this examination revealed that Claimant's lumbar spine showed signs of a "progressive maturation of [the] posterolateral spinal fusion." Dr. Maguire recommended that a MRI be taken of Claimant's spine to determine if radiculopathy existed from the pedicle screw placement in Claimant's back. Claimant continued to be considered temporarily totally disabled at the time of this examination.

On June 22, 2000, Dr. Maguire recommended that Claimant undergo an additional surgical procedure to remove the pedicle screw that had been placed in his back at L5-S1 on the

right side. Dr. Maguire determined that Claimant continued to be temporarily totally disabled pending the pedicle screw removal surgery. On August 28, 2000, Dr. Maguire again recommended that Claimant have the pedicle screw removed from the right side at the L5-S1 level. Claimant had received cardiac clearance for the procedure, but had chosen not to undergo the surgery because he had "concern with care during hospitalization." Dr. Maguire felt that Claimant was a candidate for vocational rehabilitation, but Claimant had not reached permanent and stationary status.

Dr. Maguire authored an extensive report, dated October 19, 2000, after his examination of Claimant on October 2, 2000. Dr. Maguire outlined his interactions with Claimant and the treatment

that Claimant had received. Dr. Maguire reiterated that Claimant was diagnosed as suffering from degenerative disease at the L5-S1 level with mid-line disc bulging. On August 18, 1998, titanium cages were implanted in Claimant's spine and Claimant's right anterior iliac crest bone was harvested and used in the arthrodesis procedure. On November 3, 1999, Claimant had a posterolateral arthrodesis at the L5-S1 level with the implantation of pedicle screws. While Claimant was hospitalized for this procedure, he suffered a myocardial infarction.

After these procedures, Claimant's pain persisted. On June 5, 2000, a MRI of Claimant's lumbar spine was done. The MRI revealed changes consistent with post-operative changes at the L5-S1 level and the pedicle screws did not appear to have compressed the nerve root. Claimant experienced persistent pain and discomfort in his right lower extremity and lumbar region. On this date, Dr. Maguire determined that Claimant's condition was permanent and stationary based on Claimant's x-rays.

Dr. Maguire reviewed the subjective and objective aspects of Claimant's disability. Claimant reported an aching discomfort in his lumbar spine. Claimant also reported that the pain radiates into his right lower extremity suggesting sciatic nerve root irritation and increased pain in the left leg when standing or sitting for over 30 minutes. Claimant stated that these symptoms occurred on a frequent to continuous basis. Claimant rated the symptoms as being slight in intensity unless Claimant sits, stands, bends or twists on an extended basis at which time the pain becomes moderate in intensity.

Objectively, Dr. Maguire found the following symptoms:

1. What appears to be a radiographically solid arthrodesis at the L5-S1 level with retained BAK titanium cages and a retained pedicle screw;
2. Right legged limp with ambulation;
3. Continued use of a can to assist with ambulation;
4. Tenderness to palpation over the lumbar spine and the sacroiliac areas bilaterally;
5. Limited lumbar spine range of motion and difficulty straightening upright after forward flexion;
6. Positive straight leg on the right lower extremity; and
7. Residual decreased sensation into the left lower extremity.

Based on Claimant's subjective complaints and Dr. Maguire's objective findings, Dr. Maguire found that Claimant is disabled and limited to light work. Dr. Maguire advised that Claimant should work in an environment that allows Claimant to work in a standing position or walk with limited physical demands. Dr. Maguire also advocated that Claimant be treated by a pain management specialist.

Dr. Maguire advised Claimant to undertake a home exercise program to strengthen his abdomen and "paraspinal musculature." Dr. Maguire determined that Claimant would be precluded from returning to his work duties as an outside machinist, and recommended vocational rehabilitation. Dr. Maguire continued to recommend that Claimant undergo a procedure to remove the pedicle screw form the right side at the L5-S1 level which Claimant declined.

On November 16, 2000, Dr. Maguire recommended that Claimant come under the care of a pain management specialist for proper control of Claimant's medication and chronic pain. Claimant continued to complain of needing to change positions and move on a continual basis to avoid discomfort. Claimant also reported that he was unable to sit for longer than 5 to 10 minutes and standing for more than 10 minutes causes an increase in Claimant's pain. Claimant stated further that he requires the ability to lie down in the process of the day, and Claimant doubted that he could return to work at an 8 hour work day and 40 hour work week.

Dr. Maguire stated that Claimant's condition is permanent and stationary from an orthopedic standpoint, but recommended that Claimant see Dr. Strauser "pain control, better utilization of medications, and overall improved pain management."

June 3, 2000 MRI

A MRI of Claimant's lumbar spine was performed on June 3, 2000. (CX 3). The MRI report outlines the history of Claimant's condition, which includes both surgeries. The impression of the reader of the MRI was as follows:

> [p]ost operative changes at L5-S1 with intervertebral disc space spacer at L5-S1 creating mild artifact. Pedicle screws are noted in place at L5 and S1 without complication. As small amount of fluid is noted in the facets at L5-S1 bilaterally. No evidence of recurrent disc herniation is identified.

Dr. Walter Strauser

Dr. Walter Strauser specializes in physical medicine and rehabilitation with a subspecialty certification in pain management. (CX 6). Dr. Strauser is a board certified psychiatrist and is a

Diplomat of the American Board of Pain Medicine.[8] Dr. Strauser first met with Claimant on January 11, 2001. At that time, Dr. Strauser had reviewed Dr. Maguire's records. Dr. Strauser outlined the circumstances surrounding Claimant's injury and the subsequent treatment that Claimant received.

Claimant reported to Dr. Strauser that he was suffering from a constant ache in his low back and right buttocks with an "episodic pain radiating from anus to umbilicus." Dr. Strauser noted that coughing and sneezing triggers the pain. Claimant also reported that he suffers from episodic aching in his right lateral calf and the dorsal aspect of Claimant's right foot, and a constant numbness in his left anterolateral thigh. Claimant stated that his pain increases with cold and damp weather and excessive sitting and standing.

Claimant also reported that he spends 12 to 15 hours per day in bed due to his back pain. Claimant stated that his ability to lift varies, but that he is still "strong as an ox." Dr. Strauser conducted a physical examination that revealed that Claimant's stance and gait were abnormal. Dr. Strauser noted that Claimant walks with the use of a cane and has a "slow antalgic gait." Dr. Strauser found tenderness in Claimant's "lower lumbar paraspinal musculature and over the sacral region bilaterally." Dr. Strauser found Claimant's range of motion to be 25% of normal.

At this point, Dr. Strauser diagnosed Claimant as suffering from chronic low back pain, probable chronic right lumbosacral radiculopathy, and possible left meralgia parethetica. Dr. Strauser notes that although Claimant's L5-S1 fusion is solid, Claimant continues to experience chronic low back pain. Dr. Strauser also noted that Claimant reports inactivity due to the pain he experiences. Dr. Strauser recommended changing Claimant's medications and once Claimant's pain is decreased, there should be an increase in his physical activity.

Claimant met with Dr. Strauser again on January 26, 2001 when Dr. Strauser reiterated his original diagnoses and changed Claimant's medications. On February 9, 2001, Claimant again saw Dr. Strauser and Claimant reported a decrease in his pain level and improved functional capacity. Claimant had started riding his bicycle on a daily basis and had applied for a full-time job as a tool room supervisor. Claimant continued to report difficulty sleeping. On March 26, 2001, Claimant again met with Dr. Strauser. At this point, Claimant had suffered a strained right knee when his leg "gave out." Again, Claimant reported a decrease in the pain in his low back and an increase in his activity level.

Dr. Strauser was also deposed in connection with the above-captioned claim on May 14, 2001. (CX 7).[9] Dr. Strauser explained that Claimant was referred to him by Dr. Maguire for the management of his pain. Dr. Strauser performed six "psychosocial pain tests" at the time of

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[8] For a detailed description of Dr. Strauser's training and certifications, see CX 7, pp. 4-7 and CX 7, exhibit no. 1.

[9] Dr. Strauser's deposition is also marked as RX I.

Claimant's initial meeting with Dr. Strauser.[10] Dr. Strauser found that the results of Claimant's testing were consistent with a moderate to severe pain level with no evidence of exaggeration. (CX, p. 10). Dr. Strauser also found that Claimant's test results indicate that Claimant believes that he suffers from severely limited function due to his pain. (CX 7, p. 11).

Dr. Strauser recommended to Claimant at the time of the initial evaluation that Claimant begin taking the medication Methadone to control his pain. (CX 7, p. 15). Dr. Strauser believes that this medication can lead to long term relief for Claimant, but that it will require some time for the medication to successfully control Claimant's pain. (CX, p. 16).

In his second meeting with Claimant, Dr. Strauser found that Claimant had not experienced any relief from the use of the Methadone. (CX 7, p. 17). However, this was not surprising because several months may be required to determine the appropriate dosage to treat Claimant's pain. (CX 7, p. 17). Dr. Strauser also prescribed Nortriptyline to assist Claimant in sleeping. (CX 7, p. 18). Dr. Strauser went on to explain that since his initial visit with Claimant, Claimant's symptoms have improved and he has experienced an increase in his exercise tolerance. (CX 7, p. 19). Claimant has reported to Dr. Strauser that he feels better and has been spending less time bedridden. (CX 7, p. 19).

Dr. Strauser noted that Claimant's mood was "upbeat" when he examined Claimant on April 23, 2001. (CX 7, p. 21). At that time, Claimant reported to Dr. Strauser that he was seeking employment at the parts depot at a local Naval Base. (CX 7, p. 21). However, Claimant also reported that when he interviewed for this position, the employer did not hire Claimant because of a fear that he would suffer another heart attack. (CX 7, p. 21). Claimant did not say that he was not being considered for this employment because of his use of Methadone. (CX 7, p. 22).

Dr. Strauser explained that both Methadone and Nortriptyline can cause nausea, drowsiness, constipation, and dry mouth. (CX 7, p. 23). However, Dr. Strauser also noted that the patient is usually able to adapt to the side effects of the drugs. (CX 7, p. 23). Dr. Strauser indicated that Claimant has adapted to the use of these medications, but that as the dosages are changed, Claimant will need several days to a week to adapt to the increased dosage. (CX 7, p. 23). Dr. Strauser opined that once Claimant adapts to the use of the Methadone, he will be more active, but that this level has not yet been reached. (CX 7, p. 24). Dr. Strauser also stated that when a person is taking Methadone that person "may" be advised against operating a motor vehicle or other machinery. (CX 7, p. 38).

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[10] Dr. Strauser explains the tests administered and the purpose of the tests at length in the deposition testimony. *See* CX 7, pp. 8-13. Additionally, four of the pain questionnaires are attached to CX 7 as exhibits.

In April, 2001, Dr. Strauser believed that Claimant's condition was improving and that Claimant will continue to improve with further treatment. (CX 7, p. 25). Dr. Strauser stated that he also believes that Claimant has sought employment and that Claimant will "continue to attempt to re-enter the workforce." (CX 7, p. 25). At this time, Dr. Strauser felt that Claimant was able to return to the workforce if an appropriate position could be found. (CX 7, p. 260. However, Dr. Strauser also stated that it "remains to be seen whether [Claimant] is capable of working eight hours a day, five days a week." (CX 7, p. 26). Dr. Strauser is "hopeful" that with the implementation of the restrictions outlined by Dr. Maguire, that Claimant could return to a job requiring an 8 hour day, 5 days per week. (CX 7, p. 26).

When faced with a hypothetical job requiring Claimant to lift "at most 20 pounds with the ability to alternate position from sitting to standing," Dr. Strauser felt that Claimant could "possibly" perform this job. (CX 7, p. 27). Dr. Strauser did not place any additional restrictions on Claimant's work environment. (CX 7, p. 29). Dr. Strauser stated that he is treating Claimant only for pain management and that he "anticipates further refinement" of Claimant's medications. (CX 7, p. 30-31).

Dr. Strauser had noted that Claimant suffered from "possible left meralgia paresthetica." (CX 7, p. 40). Dr. Strauser explained that this is the name given to

> a particular compression neuropathy that affects the lateral femoral cutaneous nerve as it emerges from the pelvis into the from of the thigh, and it's a branch, I believe, of the first and second lumbar nerves and supplies the sensation on the outer upper aspect of the thigh.

Dr. Strauser went on to explain that this condition can occur with "heavy people" who walk in a way that inadvertently compresses the nerve.

Dr. John Gordon

Dr. John Gordon performed a cardiac catherization, ventricular angiography, and selective coronary angiography on Claimant in November, 1999. (CX 4). The procedures were necessitated by the myocardial infarction that Claimant suffered while hospitalized for his second back surgery.[11] As Claimant's cardiac condition bears no further relevance on this proceeding, no further discussion is necessary.

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[11] Included in the record in this claim are the hospital records pertaining to Claimant from Sharp Hospital. (CX 5). All of these records related to Claimant's heart condition.

Respondents' Evidence

In support of its position in this claim, Respondents' have submitted thirteen exhibits.[12]

Vocational Evidence

Kathryn Melamed

Included within these exhibits is the report of Kathryn E. Melamed of Far West Vocational Management of California. (RX D). Ms. Melamed conducted her initial interview with Claimant on July 28, 1999. Claimant was referred to Ms. Melamed for vocational assessment and testing, and for Ms. Melamed to conduct labor market research to establish the existence of suitable alternative employment for Claimant. Vocational testing was also performed at this time.

Ms. Melamed outlined the circumstances surrounding Claimant's injury and the work restrictions that were placed on Claimant by Dr. Dodge on April 20, 1999. Dr. Dodge's restrictions precluded Claimant from engaging in "heavy lifting, and repeated bending and stooping which contemplates the individual has lost approximately one-half of his pre-injury capacity for lifting, bending and stooping." Ms. Melamed then laid out Claimant's background and experience. Claimant completed his GED on June 7, 1972 and entered the United States Navy in December, 1972.

Claimant remained in the Navy until November 14, 1985. In July, 1986, Claimant was employed as a bartender. Claimant then went to work for Systems Engineering Associates Corporation. When working for Systems Engineering, Claimant inspected, documented needed repairs and recommended supplies. Claimant found this employment to be "repetitive and boring." Claimant then was employed to sail a boat to Pearl Harbor from San Diego. When Claimant returned from this venture, he again became employed as a bartender.

In December, 1987, Claimant was involved in a motorcycle accident that left him without work for quite some time. Before working for Southwest Marine, Claimant worked "odd jobs" painting houses, bartending, and laying tile and grout work. From September, 1991 through February, 1996, Claimant worked as a marine machinist for Southwest Marine removing and

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[12] Respondents' have submitted a summary of benefits paid to Claimant from October 4, 1996 through the present at a compensation rate of $342.67, (RX A), and the original application for Section 8(f) filed with the district director (RX B). Respondents' also have submitted Dr. Carl Maguire's report of October 19, 2000 which has already been summarized and is also located at CX 1. (RX C). A physical examination report dated September 30, 1991 is also included in the record. (RX L).

repairing shift components and parts. On April 4, 1996, Claimant began working for Respondents as a outside machinist.

Claimant reported to Ms. Melamed that he is able to stand and sit for only 10 minutes at a time on some days and on other days he can stand for up to 2 hours and yet other days he is unable to get out of bed. Claimant reported that he is able to walk up to 2 or 3 miles on some days, but that at other times he is unable to "walk down the driveway." Claimant told Ms. Melamed that he avoids lifting and experiences difficulty reaching overhead. Claimant expressed difficulty in returning to a standing position after bending and stooping. Claimant reported that he is unable to "squeeze together" his upper extremities and must ascend stairs one stair at a time.

On July 26, 1999, the vocational testing administrator, Mr. Dan Rivera met with Claimant and Dr. Maguire. On that date, Dr. Maguire limited Claimant to "[n]o repetitive bending or twisting; lifting limited to up to 10 lbs. regularly and up to 20 lbs. occasionally; and the ability to alternate standing and sitting positions at will." Dr. Maguire also indicated that to Mr. Rivera that "as a baseline a four hour work day is a good start."

At this point, Ms. Melamed determined that she would conduct a preliminary labor market survey addressing Dr. Dodge's and Dr. Maguire's restrictions to "establish a baseline in these occupational categories: 1. cashier, 2. parking lot attendant, 3. telemarketer."

Ms. Melamed authored a Vocational Evaluation Report dated July 28, 1999. This report took into consideration the vocational testing that was completed by Mr. Rivera on June 14, 1999. Mr. Rivera administered a Cognitive and Conceptual Abilities Test that measured Claimant's reasoning, mathematical, and language abilities. Claimant scored above average in reasoning and mathematical skills and excellent in language skills.

A Vocational Aptitude Battery Test was also conducted. Claimant received an excellent rating in general intelligence, and an above average rating in form perception and manual dexterity. Claimant scored average in verbal aptitude, clerical perception, spatial relations, and finger dexterity. Claimant scored below average in color discrimination. A Kiersey Temperament Sorter Test was also administered to Claimant in which he was rated as introverted, sensing, thought, and judgment (ISTJ).

Ms. Melamed interpreted Claimant's ISTJ results to show that Claimant is decisive when it comes to judgment and is dependable. This test also establishes that Claimant is quiet and serious and "extraordinarily perceiving and dependable." The test revealed that Claimant would perform his work duties without "flourish or fanfare, therefore, the dedication [Claimant would] bring to [his] work can go unnoticed or unappreciated." The test also determined that Claimant "can handle difficult, detailed figures and make sense of them."

Ms. Melamed concluded that Claimant is "intelligent with very good reasoning, mathematics, and language skills." Ms. Melamed interpreted the tests to show Claimant had

recognized 81% of the color discrimination test colors. Ms. Melamed therefore determined that Claimant has a reasonable "ability to recognize colors and pay attention to detail." Claimant exhibited the ability to learn easily and Claimant's work history makes him "a good candidate to transition into other occupations with ease." Ms. Melamed also determined that Claimant's temperament was conducive to rapid advancement, increased responsibility, and the ability to work with minimal supervision.

On July 28, 1999, Ms. Melamed authored a letter to Dr. Dodge and Dr. Maguire asking them to review the job descriptions for cashier, parking lot attendant, and telemarketer. Ms. Melamed requested that after Dr. Maguire reviewed the descriptions to provide some sort of response.

Roy Katzen

Mr. Roy Katzen authored a labor market survey, dated February 28, 2001. (RX E). Mr. Katzen listed Claimant's vocational goal as a light production/assembly position. These positions are described as being 100% indoors where the "products may be varied and include electronics equipment and sub-components, mechanical devices, plastic products or structural/fabricated metal products." Mr. Katzen also noted that Claimant should be permitted to alternate between sitting and standing.

Mr. Katzen reviewed the labor market statistics for San Diego County. In 1998, more than 22,000 people were employed in the job titles most similar to the light production/assembly position. The mean average wage for these positions was $10.83 in 1998, with the entry level wage being $7.43 per hour. The labor market statistics anticipated that the 7 job titles most similar to the goal for Claimant would grow by 3,000 jobs between 1997 and 2000.

Mr. Katzen contacted 10 employers between February 15, 2001 and February 28, 2001. These 10 employers are the employers that Mr. Katzen outlined in his testimony at the hearing in this matter. The testimony generally covers the information outlined in the survey. Therefore, the information will not be summarized again at this point. Mr. Katzen characterized the trend for hiring in the light production/assembly industry to be done through employment agencies. The individual is most often hired on a temporary basis, and if the individual performs adequately, full-time employment is then offered. Mr. Katzen then went on to summarize his interactions with the 10 employers. Mr. Katzen noted that 9 out of the 10 employers would accept an employee with minimal skills for an entry level position, at varying wages depending on experience and skills. Generally speaking, the jobs identified for Claimant by Mr. Katzen required lifting from 10 to 30 pounds and some of the positions require standing for the majority of the day while others permit Claimant to alternate between standing and sitting.

Mr. Katzen determined that the wages for the positions varied by company. The range was from $6.25 per hour for entry level to $10.00 per hour for a more experienced employee. Mr. Katzen expected that Claimant could earn approximately $8.15 per hour. Mr. Katzen felt that he had identified numerous positions that were available to Claimant, but when dealing with an employment agency, the agency can steer the person to a position that is well suited to the person's physical abilities, experience, and wage expectations.

Mr. Katzen authored an additional labor market survey on March 12, 2001. (RX E). Mr. Katzen reported that he had continued to maintain contact with Claimant since the earlier report. Mr. Katzen again recounted the history of Claimant's injury and subsequent treatment. Mr. Katzen concluded that Claimant's physical capacities limited him to light range work. Mr. Katzen opined that based on Claimant's skills and experience, Claimant is capable of entering the light production/assembly market at least at entry level.

Mr. Katzen stated that his contact with employers confirmed that Claimant is employable in the light production/assembly area, and Claimant's minimum wage earning capacity would be approximately $8.15 per hour. Mr. Katzen believed that Claimant might be able to enter the workforce above entry level and earn closer to $10.00 per hour. Mr. Katzen recounted the limitations placed on Claimant by Dr. Maguire in his October, 2000 permanent and stationary report. Mr. Katzen also noted that since Claimant has come under the care of Dr. Strauser, Claimant has exhibited a marked improvement in function. Mr. Katzen reported that when he last spoke with Claimant on March 6, 2001, Claimant reported that he was going to put his search for employment "on hold until [all of the] medical issues were resolved."

Mr. Katzen then assessed Claimant's transferable skills. Mr. Katzen determined that Claimant possessed the following transferable skills.

> 1. Academic skills, 2. knowledge of skills in using a variety of hand tools and small scale applications, 3. skills, experience and knowledge in the use of a variety of power tools and equipment, 4. experience and knowledge reading blueprints and schematic drawings related to a variety of machine applications, 5. skills and experience working in a production environment, and 6. interpersonal skills allowing Claimant to work safely and efficiently with other crafts in close physical proximity.

Using a computerized transferable skills program, Mr. Katzen found that Claimant could potentially be employed in 71 different occupations. Mr. Katzen focused on employment that would utilize Claimant's mechanical skills. The jobs Mr. Katzen focused most closely on were: bicycle assembler; filter assembler; final installer/inspector; electrical assembler; and air compressor mechanic. Mr. Katzen also identified the occupations of production assembler, bench worker, assembler, and hand tool repair as potential occupations and worthy of further investigation.

Mr. Katzen found that opportunities existed at the time of his report that fit Claimant's profile. Seven of the ten identified employers were employment agencies that possess the ability to match an individual with multiple potential employers. Mr. Katzen estimated that since the

time that Claimant's condition became permanent and stationary, Claimant possessed a wage earning capacity of at least $8.15 per hour or $326.00 per week.

Mr. Katzen felt the occupations identified by Ms. Melamed did not take into account Claimant's mechanical skills. Mr. Katzen agreed that Claimant would be able to work as a telemarketer because he possesses a personality that is conducive to such work. However, Mr. Katzen did not believe that work as a telemarketer would maximize Claimant's skills and the entry level wage in this occupation would be lower than the wages for light assembly/production positions. Mr. Katzen believed that a telemarketing position would be best if Claimant was limited to only sedentary work, rather than light work.

In summary, Mr. Katzen concluded that Claimant had exhibited a recent, significant improvement in his symptoms due to Dr. Strauser's treatments. Mr. Katzen opined that if Claimant's condition and functional capacities continue to improve, Claimant's employment opportunities expand within the light production/assembly field.

Mr. Katzen authored an addendum to his original vocational evaluation on May 15, 2001. (RX K). At this point, Mr. Katzen continued to believe that Claimant is capable of light work. Mr. Katzen indicated that he had no further contact with Claimant since the time of his previous evaluation. Mr. Katzen made two additional market contacts regarding Claimant.

First, Mr. Katzen contacted Carvin Guitars. Carvin Guitars is an electric guitar amplifier and speaker manufacturer. This employer requires minimal to no experience with the starting wage range is $7.00 to $7.50 per hour. The positions available with Carvin Guitars would require Claimant to stand and sit with lifting up to 20 pounds. Mr. Katzen also contacted Chem-tronics to determine if appropriate positions were available for Claimant.

Chem-tronics "fabricates and repairs components for [the] aerospace industry." The entry level positions available with Chem-tronics require no experience and pay $8.50 per hour. The next level positions require some production experience. Mr. Katzen also indicated that the employee is required to stand for the majority of the shift, and the lifting requirements range from 20 to 25 pounds for entry level and less lifting for the more skilled positions. However, Mr. Katzen found that the employer is willing to accommodate Claimant's needs.

Mr. Katzen again contacted the employers that were contacted in rendering the February 28, 2001 report. Mr. Katzen compiled evidence regarding the wages and availability of positions in October, 1996. Mr. Katzen found that Carvin Guitars, HM Electronics, Eastridge, Sony/Adecco,

Savar Consulting, and Chem-tronics were all hiring new entry level employees in October, 1996. Mr. Katzen also found that the wages offered for these entry level positions were $1.50 less than the wages offered at the time of the report. Mr. Katzen estimated that Claimant's wage earning capacity in October, 1996, would have been between $6.50 and $7.50 or between $260.00 and $300.00 per week.

Medical Evidence

Dr. Larry Dodge

The records of Dr. Larry Dodge from April 20, 1999 through May 18, 2001 are included in the record in this claim. (RX H). Dr. Dodge's first notations are dated April 20, 1999. At this time, Claimant's chief complaint was low back pain. Dr. Dodge then described the circumstances surrounding Claimant's October 3, 1996 injury. Dr. Dodge reviewed numerous medical documents and diagnostic testing reports in rendering his opinion of Claimant's condition.

Dr. Dodge conducted a physical examination of Claimant on April 20, 1999. Dr. Dodge found that Claimant was able to walk heel and toe across the room without difficulty and exhibited no evidence of a limp or antalgic gait. Dr. Dodge found Claimant's thoracolumbar posture to be normal and found an active voluntary range of motion in Claimant's thoracolumbar spine, although Dr. Dodge questioned whether Claimant was putting forth his best effort.

Claimant's straight leg raise test was normal and a motor examination of Claimant's lower extremities produced normal results. Dr. Dodge noted that his diagnostic impression was that Claimant suffers from a "lumbosacral strain and contusion, degenerative disc disease, L5-S1, without herniation, status-post anterior interbody fusion, L5-S1, with persistent pain." Based on Dr. Dodge's assessment of Claimant's subjective complaints and the objective findings, Dr. Dodge determined that Claimant's condition was permanent and stationary on April 20, 1999.

Subjectively, Claimant reported that his symptoms varied from slight to moderate, and that the pain is intermittent and aggravated with bending, stooping, or lifting. Objectively, Dr. Dodge noted that Claimant's surgical scars in the iliac crest and abdominal areas were healed, that Claimant's lumbar spine bone scan of April 17, 2997 showed normal results, that the MRI of January 16, 1997 disclosed a minimal disc bulge at L5-S1, that Claimant's diskogram was normal at L4-5 and abnormal at L5-S1, and a normal neurologic examination.

Dr. Dodge limited Claimant's work activities to no heavy lifting, repeated bending or stooping, "which contemplates that [Claimant] has lost approximately one-half of his pre-injury capacity for lifting, bending and stooping." Applying the *American Medical Association's Guidelines of Permanent Impairment, 4th Edition*, Dr. Dodge found that Claimant's "intervertebral disc lesion with status-post surgery, in which residual symptoms correspond" correlated to a 70% whole person impairment. Dr.

Dodge opined that Claimant would require medical care over the 12 months after the date of the report, with the ability to meet with a physician every 2 to 3 months. Dr. Dodge further opined that Claimant may need further surgery, but such a recommendation was not warranted at this point.

Dr. Dodge authored a letter to Kathryn Melamed dated August 10, 1999, finding that Claimant was physically capable of performing the job duties of cashier, parking lot attendant, and telemarketer. On September 20, 1999, Dr. Dodge drafted a letter to Carrier's Steven Hunolt

stating that Claimant is permanently partially disabled in his low back. Dr. Dodge attributed Claimant's condition to both degenerative disc disease and the October 3, 1996 injury. Dr. Dodge opined that both of these conditions combined to produce Claimant's present disability. Dr. Dodge concluded that Claimant's "disability is materially and substantially greater than that which would have resulted from the October 3, 1996 injury alone."

Dr. Dodge conducted an independent medical evaluation of Claimant's condition on May 18, 2001. (RX H). Dr. Dodge based his opinion on his pre-examination interview with Claimant, his examination of Claimant, and a review of numerous medical documents. Claimant's chief complaint at the time of the evaluation was low back pain and right leg pain. Dr. Dodge outlined the history of Claimant's injury and an extensive review of the treatment rendered to Claimant.

Dr. Dodge conducted a physical examination of Claimant which showed that Claimant had difficulty with heel walking on the right and the right straight leg raise test produced pain. Dr. Dodge also noted that Claimant's lower extremities motor examination showed normal results in major muscle groups. Dr. Dodge ordered a roentgenographic examination that showed the pedicular screws and bone cage at the L5-S1 level. Dr. Dodge found that Claimant suffered from a "lumbosacral strain, degenerative disc disease, L5-S1, without disc herniation, status-post anterior and posterior spinal fusion, L5-S1, with persistent subjective complaints of pain."

Based on Claimant's subjective complaints and Dr. Dodge's objective findings, Dr. Dodge determined that Claimant's condition was permanent and stationary at this point. Claimant reported constant, mild pain in his low back that increased to slight to moderate pain with repetitive bending and heavy lifting.

Dr. Dodge restricted Claimant to no heavy work. Dr. Dodge opined that Claimant had lost one-half of his "pre-injury capacity for activities such as bending, stooping, lifting, pushing, pulling, and climbing or other activities involving comparable physical effort." Applying the *AMA Guidelines*, Dr. Dodge found a 10% whole person impairment based on Claimant's first surgical procedure in addition to 2% for the second surgical procedure, for a total whole person impairment of 12%.

Dr. Dodge felt that Claimant should be weaned from narcotics, as narcotics should not have been necessary for the treatment of Claimant's pain. Dr. Dodge encouraged Claimant to condition

himself through exercise. Dr. Dodge agreed with Dr. Maguire that the pedicle screws should be removed from Claimant's back to alleviate some of Claimant's pain. However, Dr. Dodge concluded that none of these factors changed the fact that Claimant's condition has reached permanent and stationary status.

Dr. Dodge stated that he believes that Claimant suffered a "simple muscle strain" on October 3, 1996. However, based on Claimant's continuous complaints, Claimant underwent extensive care that Dr. Dodge believes has worsened Claimant's condition. Dr. Dodge noted that Claimant "initially strained his back and had pain in the left arm, left ribs, and low back." This is

the indication in the hospital report from October 3, 1996 in which Claimant stated to the hospital staff that he was not injured.

Dr. Dodge notes further that Dr. William Previte, an orthopedic surgeon, found that Claimant did not suffer from any significant condition and released Claimant to full duty noting a 0% whole person impairment. Dr. Dodge points out that during this time, Claimant was terminated from his employment with Respondents for drug use. In January, 1997, Claimant returned to Dr. Previte for treatment, at which time, Dr. Previte recommended that a MRI study be conducted.

The January 16, 1997 MRI showed nothing of significance except a minimal disc bulge at L5-S1 with no herniation. When Dr. Previte reviewed the January 16, 1997, MRI, he noted that the MRI confirmed his opinion that "nothing particularly worrisome [was] wrong with [Claimant] and he could simply continue with his normal endeavors, continue on an independent exercise program for his occasional back pain, and he was released from care." Dr. Dodge noted that Claimant then came under the care of Dr. Maguire.

An April, 1997 bone scan produced normal results. Dr. Maguire then recommended a diskogram, which was opposed by Dr. Previte. Claimant was referred to Dr. William Curren who determined that diskography was reasonable in Claimant's situation. The diskography found degenerative disc disease at the L5-S1 level, and that based on the degenerative disc disease coupled with Claimant's complaints, Dr. Maguire believed surgical intervention to be appropriate.

On August 18, 1998, an anterior laproscopic interbody fusion with a right anterior iliac crest bone graft was performed. The surgery failed to alleviate Claimant's symptoms. Dr. Dodge believes that this result calls into question whether Claimant's disc disease was ever symptomatic or the cause of Claimant's pain. Dr. Dodge notes that Claimant was then believed to suffer from possible pseudoarthrosis due to the fact that Claimant's pain had failed to improve.

A second surgery was undertaken on November 3, 1999 and pedicle screw instrumentation with a posterior iliac crest bone graft was performed. Claimant's condition became further complicated by post-surgery right leg pain and a myocardial infarction. Based on a June 3, 2000 MRI, Dr. Maguire

considered removing the pedicle screw, but Claimant rejected this option. Claimant continues to complain of pain. Dr. Dodge doubts that this condition can be improved. Dr. Dodge therefore believes that Claimant has reached maximum medical improvement.

Included in the record in this claim are the office records of Dr. Dodge pertaining to Claimant.[13] (RX F). Office records dated from December 21, 1988 through March 14, 1989

pertain to Dr. Dodge's treatment of Claimant's left elbow and left leg injuries. All of Dr. Dodge's records pertain to these injuries.

Dr. Carl Maguire

Dr. Carl Maguire was deposed on May 31, 2001 regarding his treatment of Claimant's condition. (RX J). Dr. Maguire testified that he performed two surgical procedures on Claimant. (RX J, p. 5). The first procedure was an anterior interbody fusion on August 14, 1998. (RX J, p. 5). Dr. Maguire stated that he performed this procedure because Claimant

> had axial spinal pain primarily, that is pain limited to the spine itself, which did not respond to his satisfaction with conservative treatment. He had an abnormal disk on his MRI scan at one level, and we performed a diskography [sic] at the abnormal level and the adjacent normal level. And the diskogram [sic] was painful at the abnormal level and normal at the adjacent normal levels.

(RX J, p. 5). Dr. Maguire undertook the interbody fusion to remove a "major portion of the painful and symptomatic disk." (RX J, p. 5). Based on a diskography, Dr. Maguire determined that Claimant suffers from a degenerative disc. This condition was diagnosed by MRI, but Dr. Maguire was not certain that the condition was the cause of Claimant's pain. (RX J, p. 7-8). Dr. Maguire stated that while the disc was not herniated, it had lost its "structural integrity." (RX J, p. 8).

Dr. Maguire explained that the fusion was to stabilize the area involved. (RX J, p. 8). Dr. Maguire explained further that once it is determined that a disc is the source of the pain, a fusion is the accepted treatment for the condition. (RX J, p. 9). Dr. Maguire stated that conservative treatment was attempted for several months with Claimant, but that the desired results were not achieved. (RX J, p. 9). Dr. Maguire agreed that a "large reason" that the surgery was indicated was because of Claimant's subjective pain complaints. (RX J, p. 9-10).

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[13] It should be noted that many of documents included in this exhibit are illegible.

Dr. Maguire testified that after the completion of the initial surgical procedure, Claimant continued to experience pain. (RX J, p. 10). Dr. Maguire followed Claimant's condition for one year and Claimant continued to suffer from low back pain that occasionally extended into Claimant's lower extremities. (RX J, p. 10). Dr. Maguire determined that a solid fusion had not been achieved. (RX J, p. 10). By September, 1999, Claimant's condition had resulted in pseudoarthrosis. (RX J, p. 10).

Dr. Maguire explained that he determined that Claimant's spine had not fused properly because Claimant continued to experience pain. (RX J, p. 11). With the continued complaints of pain, Dr. Maguire followed up with a x-ray that revealed continued motion, this a failure to fuse (pseudoarthrosis). (RX J, p. 11). Once it is determined that a person is suffering from pseudoarthrosis, then if the pain is significantly limiting, a fusion can be attempted from the posterior with pedicle screws. (RX J, p. 11).

Claimant's second surgery was performed by Dr. Maguire on November 3, 1999. (RX J, p. 13). Claimant continued to experience pain in his back and some right sciatic nerve pain, indicating to Dr. Maguire that the sciatic pain "may be secondary to irritation of the nerve." (RX J, p. 13-14). At this point, Dr. Maguire recommended that the pedicle screw be removed. (RX J, p. 14). Claimant indicated to Dr. Maguire that he did not wish to undergo this procedure because he had suffered a myocardial infarction when he was hospitalized after the second surgery. (RX J, p. 15).

Dr. Maguire found that prior to Claimant's first surgery, June 12, 1997, Claimant had reached maximum medical improvement. (RX J p. 15). Also at that time, Dr. Maguire found that Claimant was disabled from any heavy lifting. (RX J p. 15). Dr. Maguire opined that he is able to render an opinion as to the appropriateness of a position for an individual without knowing the specific limitations of the person. (RX J, p. 18). Dr. Maguire stated that he depends on the individual's own assessment of how much he or she can lift in rendering an opinion. (RX J, p. 19).

Dr. Maguire again determined that Claimant had reached maximum medical improvement after Claimant's second surgery, but before recommending that Claimant undergo the pedicle screw removal. (RX J, p. 19). On October 2, 2000, Dr. Maguire found that Claimant had reached maximum medical improvement. (RX J, p. 20). Dr. Maguire found, at this time, that Claimant's fusion was solid, however, Claimant continued to experience significant symptoms. (RX J, p. 20). Dr. Maguire believed that sciatic nerve root irritation was indicated because Claimant continued to experience back pain and symptoms in his right lower extremity. (RX J, p. 20). Dr. Maguire believes that Claimant was more greatly disabled at this point than he had been in May, 1997. (RX J, p. 20).

Dr. Maguire believes that a good fusion was achieved with Claimant, but Dr. Maguire would not consider Claimant's treatment a success. (RX J, p.21). However, Dr. Maguire indicated that considering Claimant's condition from an objective standpoint only, Claimant's condition is better now

than it was before the surgeries because a solid fusion was achieved. (RX J, p. 21). Dr. Maguire stated that he considers Claimant's condition is worse now because of Claimant's subjective complaints. (RX J, p. 22). Dr. Maguire reiterated that he has no change in his opinion since the October 2, 2000 determination. (RX J, p. 23).

In October, 2000, Dr. Maguire determined that Claimant is capable of light duty work on an 8 hour, 5 days per week basis. (RX J, p. 23). Dr. Maguire was presented with Claimant's contention that he does not believe that he is able to work a full 8 hour work day, and Dr. Maguire reiterated that he sees no objective reason why Claimant would be unable to tolerate an 8 hour work day. (RX J, p. 24). Dr. Maguire indicated that Claimant would be unable to perform a job that requires repetitive twisting or lifting from the floor to ceiling. (RX J, p. 34). Dr. Maguire

also believes that Claimant would be "pushing his limits" if Claimant is required to lift 10 pounds from the floor to waist level on a repetitive basis. (RX J, p. 35).

Dr. Maguire then stated that on November 16, 2000, he recommended that Claimant undergo a work tolerance evaluation because Dr. Maguire experiences difficulty in reviewing job descriptions for Claimant without access to the evaluation results. (RX J, p. 26). Dr. Maguire briefly reviewed the jobs outlined by Mr. Katzen. (RX J, p. 27-29). Dr. Maguire determined that Claimant would be able to perform the jobs Mr. Katzen listed for Savar Consulting, On-Site, HM Electronics, Express Personnel, and Eastridge. (RX J, p. 27-29).

Dr. Maguire found that the job requirements for the position with Adecco might be beyond Claimant's capabilities because the job requires a 35 pound range for lifting. (RX J, p. 28). As for Remec, Dr. Maguire thought that the lifting requirements were within Claimant's range, but the fact that Claimant may be required to sit for the majority of the day might be beyond Claimant's capabilities. (RX J, p. 28). Dr. Maguire also believed that the 30 pound lifting and the sitting requirements for the Sony/Adecco jobs might be beyond Claimant's capabilities. (RX J, p. 29). Dr. Maguire opined that the positions available with Industrial Staffing might be beyond Claimant's capabilities because Claimant would not have complete control over his ability to alternate between sitting and standing. (RX J, p. 29). Dr. Maguire concluded that any job that requires lifting between 20 and 25 pounds and that gives Claimant the ability to alternate between sitting and standing would be appropriate for Claimant. (RX J, p. 29).

As for future medical care, Dr. Maguire believed that Claimant should continue to treat with Dr. Strauser for pain management. (RX J, p. 32). Dr. Maguire opined that until Dr. Strauser determines that Claimant no longer needs to continue treatment for his pain control, this treatment is necessary for Claimant's condition. (RX J, p. 32).

Dr. W. Padilla

The office records of Dr. W. Padilla are included in the record in the above-captioned claim. (RX G). These records are dated between June 23, 1995 through February 22, 1996 and pertain to the treatment of Claimant's hypertension.

Other Evidence

In support of its position in this claim, Respondents submit surveillance evidence regarding Claimant's activities on June 12, 17, & 19, 2001. (RX M). The surveillance tape dated June 12, 2001, is approximately 9:50 minutes in duration and covers the time span of 7:02 a.m. through 7:13 a.m. and 12:11 p.m. and 12:26 p.m. The film shows Claimant walking with a cane, although Claimant does not appear to be relying on the cane in any significant respect. The film also shows Claimant jogging across a street without the use of the cane.

Claimant was again observed on June 17, 2001. This film is approximately 10:41 minutes in duration and covers the time period of 10:41 a.m. through 11:32 a.m. Claimant is observed riding his bicycle to a marina and back to his home. The June 19, 2001 surveillance shows Claimant walking with a cane, but again, not relying on the cane to any significant degree. The film also shows Claimant jogging across a street without the use of the cane for approximately 1.5 minutes. This film also shows Claimant walking into the hearing location noticeably relying on his cane to a more significant degree. This film is 6 hours, 10 minutes in duration and covers a time period of 7:22 a.m. through 8:16 a.m.

Administrative Law Judge's Exhibits

The record contains four exhibits marked as the Court's exhibits. A work capacity evaluation dated May 14, 2001 by Dr. Maguire indicates that Claimant suffered a back injury that precludes him from sitting for more than 2 hours, walking for more than 6 hours, and standing for more than 4 hours in the process of a work day. (ALJX 3). Dr. Maguire also indicates that Claimant should not reach above his shoulders for more than one hour per day nor should Claimant operate a motor vehicle for more than one hour. Dr. Maguire also limited Claimant to no pushing over 20 pounds, no pulling over 20 pounds, no lifting over 10 pounds, and no climbing for over 1/2 hour. Dr. Maguire concluded that Claimant's "sitting/standing should be limited to 30 minutes and Claimant "[n]eeds the ability to change position and move about periodically."

JURISDICTION

Neither party has contested that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act. I find this stipulation to be supported by the evidence of record. Therefore, I find that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act.

RESPONSIBLE EMPLOYER

Claimant's injury occurred while Claimant was employed by Continental Maritime of San Diego on October 3, 1996. Neither party contested that Claimant was injured within the scope and course of his employment and that an employer/employee relationship existed at the time of the injury. Accordingly, Continental Maritime of San Diego is the properly designated responsible employer.

TIMELINESS OF NOTICE

An employee has 30 days to provide notice to the employer of injury or death. 33 U.S.C. § 912. The time limitation begins when reasonable diligence would have disclosed the relationship between the injury and the employment. 33 U.S.C. § 912(a). A presumption exists in favor of sufficient notice of the claim having been given. 33 U.S.C. §912(b). Neither party has

contested Claimant provided timely notice to Respondents of the injury. Accordingly, I find that timely notice was provided.

TIMELINESS OF CLAIM

The timeliness of the claim must be considered. Claimant's timely filing of the claim was not challenged by Respondents. As such, I find that the claim was filed timely.

TIMELY CONTROVERSION

Claimant has not contested that Respondents filed a timely controversion of Claimant's claim for benefits. As such, I find that Respondents filed a timely controversion to Claimant's claim.

AVERAGE WEEKLY WAGE

The parties have stipulated to Claimant's average weekly wage. The parties agree that Claimant's average weekly wage is $514.00. This average weekly wage produces a compensation rate of $342.67. I find these stipulations to be supported by the evidence of record. Therefore, I find that Claimant's average weekly was is $514.00 for a compensation rate of $342.67.

MODIFICATION

Considering that a Decision and Order was previously issued with regard to the injury that is the subject of this claim, this claim has been treated as a request for modification. Modification requests are permitted and governed by the provisions of Section 22. 33 U.S.C. § 922. A petition for modification may allege either a mistake of fact or a change in condition. Neither party has alleged a mistake in fact in Judge Karst's April 8, 1998 Decision and Order. Therefore, the modification is

sought based on a change in condition. Modification based on a change in condition is granted where a claimant's physical condition has improved or deteriorated following entry of the award but before the request for modification. *See Rizzi v. Four Boro Contracting Co.,* 1 BRBS 130 (1974).

A change in a claimant's economic condition may be properly considered for modification, even without a change in physical condition. *Metropolitan Stevedore Co. v. Rambo,* 115 S.Ct. 2144 (1995) (*Rambo I).* It is clear that physical and economic conditions are interrelated under the Act and at times a determination of one factor resolves an issue regarding the other. Under the LHWCA, an employer may attempt to modify a total disability award pursuant to Section 22 by offering to establish the availability of suitable alternative employment.

The party requesting modification has the burden of proof in showing a change in condition. *See Vasquez v. Continental Maritime,* 23 BRBS 428 (1990); *Winston v. Ingalls Shipbuilding,* 16 BRBS 168 (1984). Modification based on a change in condition may be granted

where a Claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Wynn v. Clevenger Corp.,* 21 BRBS 290 (1988). There is no "bright line rule" as to what constitutes a change in physical condition sufficient to establish necessity for a modification proceeding or to award or decrease benefits. It appears that Respondents are alleging that Claimant has experienced a change in physical condition because Respondents are alleging that since the time of Judge Karst's decision, Claimant's condition has become permanent. Whether Respondents have established that Claimant's condition is now permanent will be discussed below.

A request for modification due to a change in economic circumstances falls mainly into two categories: (1) Claimant alleges that employment opportunities previously considered suitable are not suitable; or (2) Respondents contend that suitable alternative employment has become available. It follows that the standards for establishing suitable alternative employment (or lack thereof) apply in a modification proceeding. *Blake v. Ceres Inc.,* 19 BRBS 219 (1987).

A change in economic condition need not be "substantial" in order to warrant a Section 22 modification. *Ramirez v. Southern Stevedores,* 25 BRBS 260 (1992); *Lucas v. Louisiana Insurance Guaranty Ass'n,* 28 BRBS 1 (1994). Respondents are alleging that suitable alternative employment has been identified and therefore, Claimant has experienced a change in economic condition. This also will be discussed below.

Employer cannot raise the issue of Section 8(f) in a Section 22 proceeding if the issue was not raised and litigated in the initial hearing unless special circumstances exist, which, in the interests of justice, outweigh the need for finality in judicial decision-making. If Section 8(f) was not applicable to the injury before the modification was sought, the employer may seek it for the first time in a Section 22 proceeding. *Director, OWCP v. Edward Minte Co.,* 803 F.2d 731 (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co.,* 16 BRBS 314 (1986). As Judge Karst's 1998 decision pertains only to the

rendering of further medical benefits and the temporary nature of Claimant's condition, Respondents will be permitted to raise the issue of Section 8(f) relief in this claim. Section 8(f) has no application to a claim for medical benefits and temporary disability, therefore, it is properly raised at this time.

NATURE AND EXTENT OF DISABILITY

The first issue to determine with respect to the nature and extent of Claimant's disability is whether the injury is temporary or permanent. A finding that a disability is permanent has several effects. First, in the case of total disability, it allows the addition of a cost of living increase to the Claimant's benefits. *See* 33 U.S.C. § 910(f). Second, only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under Section 8(f) of the Act. *See* 33 U.S.C. § 908(f). Third, a Claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985).

The date on which a Claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

An injured worker's impairment may be found to have changed from temporary to permanent under either of two tests. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120, 122-23 (1988). Under the first test a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Thus, an irreversible condition is permanent per se. *Drake v. General Dynamics Corp., Elec. Boat Div.*, 11 BRBS 288, 290 n.2 (1979).

Under the second test a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied* 394 U.S. 976 (1969). *See also Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). In such case, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. *Leech v. Service Eng'g Co.*, 15 BRBS 18, 21 (1982).

The date on which a claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60; *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Blakeslee,Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

A date of permanency may not be based, however, on the mere speculation of a physician. It is the medical evidence that determines the start of permanent disability, regardless of economic or vocational considerations. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988). Thus, a judge must discuss the medical opinions of record regarding permanency, rather than relying on economic factors. *See Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 9 (1984); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 324 (1983); *Williams v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979).

Likewise, evidence of the ability to do alternative employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 231 (1984); *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Eng'rs*, 14 BRBS 395, 401 (1981). If a physician does not specify the date of maximum medical improvement, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988).

Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon*, 19 BRBS at 245. Permanency does not, however, mean unchanging. Accordingly, permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, 204, *aff'd on recon.*, 20 BRBS 26 (1987); *Trask*, 17 BRBS at 60.

A prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981). In *dicta*, the Board has remarked that even a prognosis that improvement and employment are "likely" at

some unspecified time in the future does not preclude a finding of permanency. *Walsh,* 13 BRBS at 445.

Claimant argues that he has not yet reached maximum medical improvement because he continues to be under the care of Dr. Strauser for pain management purposes. Claimant alleges that because this is a petition for modification, Respondents have failed to establish that Claimant has experienced a physical change in condition. Claimant alleges further that because Respondents have failed to show a change in physical condition, i.e. that Claimant has reached maximum medical improvement, Judge Karst's decision awarding temporary total disability benefits should remain in effect.

Additionally, Claimant argues that his condition has not lasted for a lengthy period nor is the condition of lasting and infinite duration because Claimant is being treated with Methadone for pain management. Claimant believes that his condition will not become permanent until such time that Claimant's medication is adjusted to maximize the effects of the Methadone. Claimant alleges that even though his condition has been treated for a lengthy period of time, the condition continues to be temporary in nature and his condition will continue to improve with the administration of pain management therapy.

Respondents allege that Claimant has reached maximum medical improvement, and thus, Claimant's condition has reached permanent status. Respondents argue that Claimant's condition will not improve with the administration of any further medical treatment. Respondents advance the proposition that Drs. Dodge, Maguire, and Strauser have agreed that Claimant's physical condition will not improve. Respondents believe that Dr. Strauser's treatment of Claimant is merely to manage Claimant's medication, not to improve Claimant's condition in any way.

Whether Claimant's condition has reached maximum medical improvement is an issue that must be resolved on the basis of the physician opinion evidence contained in the record. Dr. Maguire has found that Claimant has reached maximum medical improvement. Dr. Maguire made this finding on 3 separate occasions, the most recent of which was October 2, 2000.[14] (CX 1, RX J). Dr. Maguire bases this finding on his objective test results, Claimant's complaints, and a x-ray of Claimant's back on

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[14] The other two findings were made in June, 1997 and after Claimant's second surgery that was done in November, 1999. However, the first full report outlining Dr. Maguire's position was rendered in response to an October 2, 2000 examination of Claimant. I have accorded the most weight to the finding made on this date because Dr. Maguire more clearly explains why he believes Claimant reached maximum medical improvement as of this date.

this date. Dr. Maguire advocated at this time that Claimant come under the care of a pain management specialist for treatment of Claimant's chronic pain and for the regulation of Claimant's medications.

Dr. Dodge also determined that Claimant has reached maximum medical improvement. Dr. Dodge first made this finding on April 4, 1999. (RX H). However, at this time, Dr. Dodge also found that Claimant may require some surgery in the future. Claimant underwent such a surgery in November, 1999, therefore, I accord less weight to Dr. Dodge's determination that Claimant's condition was permanent and stationary as of April, 1999. On May 18, 2001, Dr. Dodge conducted an independent medical evaluation of Claimant's condition. At this time, Dr. Dodge found that Claimant had reached maximum medical improvement and that Claimant suffered from a 12% whole person impairment. Dr. Dodge noted that although Claimant continued to complain of pain, Dr. Dodge doubted that Claimant's condition could be improved, thus finding that Claimant had reached maximum medical improvement.

Dr. Strauser diagnosed Claimant as suffering from chronic low back pain. (CX 6). Dr. Strauser prescribed the use of Methadone for Claimant's pain. (CX 7). Dr. Strauser opined that this medication would increase Claimant's activity level and would lead to the relief of Claimant's pain. I find that Claimant reached maximum medical improvement as of October 2, 2000. Pain management is not a natural part of the healing process. Claimant's condition is permanent and stationary,. I base the date of maximum medical improvement on the findings of Dr. Maguire. That pain management is necessary is not inconsistent with this finding.

Dr. Maguire was most closely associated with Claimant's treatment and surgeries. This puts Dr. Maguire in the best position to determine when Claimant reached maximum medical improvement. Additionally, Dr. Dodge's finding in May, 2001, supports the finding of maximum medical improvement as of October 2, 2000. This is so because Dr. Dodge did not have access to Claimant during the time in which Claimant reached maximum medical improvement, but in his report dated close to the time of Dr. Maguire's determination, Dr. Dodge also found Claimant had reached maximum medical improvement. I do not find Dr. Strauser's opinion regarding Claimant's pain management to be persuasive on this issue. Dr. Strauser never discusses whether Claimant's physical condition has reached maximum medical improvement, but finds that the proper management of Claimant's pain is necessary therefore indicating that the pain is permanent. Accordingly, I find that Claimant reached maximum medical improvement as of October 2, 2000.

As the evidence establishes that Claimant has reached maximum medical improvement, Respondents have established a change in Claimant's physical condition. Therefore, modification of Judge Karst's decision is appropriate. The date of maximum medical improvement indicates the time at which Claimant's condition ceased to be temporary and became permanent in nature. However, a finding of maximum medical improvement does not indicate the date on which a claimant's condition ceases to be a totally disabling. *Stevens v. Director, OWCP,* 909 F.2d 1256 (9th Cir. 2990). The

availability of suitable alternative employment establishes the time at which the disability becomes partial. *Id.*

Unless a worker is totally disabled, he is limited to the compensation under the appropriate schedule provisions. *Wilson v. Ingalls Shipbuilding,* 16 BRBS 168, 172 (1984). Claimant has alleged that he is and continues to be totally disabled. Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. The employee has the initial burden of proving total disability. To establish a prima facie case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury.

At this initial stage, Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliot v. C&P Tel. Co.,* 16 BRBS 89 (1984). If Claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co., (Walker II),* 19 BRBS 171 (1986). It is abundantly clear from the evidence presented from the physicians of record and the vocational experts that Claimant cannot return to his pre-injury employment as an outside machinist. *See* CX1, 6, & 7, RX D, E & H.

If Claimant establishes a prima facie case of total disability, the burden shifts to Respondents to establish suitable alternative employment. Respondents must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried.

Claimant does not have the burden of showing that no conceivable suitable alternative employment is available; rather, Respondents must prove that suitable alternative employment exists. *Shell v. Teledyne Movible Offshore,* 14 BRBS 585 (1981); *Smith v. Terminal Stevedores,* 11 BRBS 635 (1979).

If Respondents meet their burden and show suitable alternative employment, the burden shifts back to Claimant to prove a diligent search and willingness to work. *Williams v. Halter Marine Serv.,* 19 BRBS 248 (1987). If Claimant does not prove such, at most his disability is partial, not total. 33 U.S.C. § 908(c); *Southern v. Farmers Export Co.,* 17 BRBS 64 (1985).

The employer is not required to act as an employment agency for a claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The employer must demonstrate that specific job opportunities exist which the injured employee could perform considering the claimant's age,

education, work experience, and physical restrictions. *Edwards v. Director,* 99 F.2d 1374 (9th Cir. 1993), *cert. denied* 114 S.Ct. 1539 (1994).

The employer need not place the claimant in suitable alternative employment. *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 237 n. 7 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BRBS 231, 234 (1984). For the job opportunities to be realistic, the employer must establish the precise nature, terms, and availability of the jobs. *Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94, 97 (1988); *Pierce v. Dravo Corp.,* 20 BRBS 94 (1987); *Rieche v. Tracor Marine,* 16 BRBS 272 (1984); *Daniele v. Bromfield Corp.,* 11 BRBS 801 (1980).

The employer must demonstrate that the claimant "would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp.,* 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State Inc.,* 31 BRBS 118 (1997). The employer must establish the claimant's earning capacity by at least establishing the pay scale for alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.,* 7 BRBS 1024 (1978); *Dupuis v. Teledyne Sewart Seacraft,* 5 BRBS 628 (1977). Merely alleging that such work is available will not do. *Burke v. San Leandro Boat Works,* 14 BRBS 198 (1981); *Bostrom v. I.T.O. Corp.,* 11 BRBS 63, 65 (1979); *Perry v. Stan Flowers Co.,* 8 BRBS 533, 536-37 (1978).

The trier-of fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.,* 17 BRBS 64, 66-67 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BRBS 231, 233 (1984); *Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691 (1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.,* 9 BRBS 473, 477-78 (1978).

The counselor must identify specific available jobs; labor market surveys are not enough. *Campbell v. Lykes Bros. Steamship Co.,* 15 BRBS 380, 380 (1983); *Kimmel v. Sun Shipbuilding & Dry Dock Co.,* 14 BRBS 412 (1981). The judge should also determine the employee's physical and psychological restrictions based on the medical opinions of record and then apply them to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Indus.,* 17 BRBS 99, 103, *motion for reconsid. denied,* 17 BRBS 160 (1985).

As a preliminary matter, it is necessary to determine the work restrictions placed on Claimant by the physicians of record. Dr. Strauser places no limitations on Claimant that go beyond those imposed by Dr. Maguire. (CX 7, p.29). Dr. Dodge, consistently has determined that Claimant is precluded from engaging in heavy work and Claimant should not engage in repetitive bending or stooping. (RX H). Dr. Dodge opined that Claimant has lost 1/2 of his pre-injury ability to bend, stoop, or lift. (RX H). Dr. Dodge also found, after reviewing the job descriptions, on August 10, 1999, that

Claimant is physically capable of performing the job duties of a cashier, parking lot attendant, and telemarketer. (RX H).

Dr. Maguire has had more extensive interactions with Claimant and has imposed more specific job duty restrictions. On August 12, 1999, Dr. Maguire determined that Claimant "should be capable of performing" the job duties of a cashier, parking lot attendant, and telemarketer, after reviewing the job descriptions of these positions. (CX 1). On October 2, 2000, Dr. Maguire determined that Claimant should be limited to light work and that Claimant should engage in work that permits him to stand or walk with limited physical demands. (CX 1). At this time, Dr. Maguire also found that Claimant was capable of working a full 8 hour day, 5 days per week at light duty status. (RX J, p. 23).

Dr. Maguire also found in October, 2000, that Claimant should not engage in repetitive twisting, or lifting from floor level to ceiling level. (RX J, p. 34). Dr. Maguire also indicated that Claimant should not lift 10 pounds from the floor level to waist level on a repetitive basis. (RX J, p. 35). On November 16, 2000, Dr. Maguire expanded on Claimant's restrictions to find that Claimant would be unable to sit for longer than 5 to 10 minutes, to stand for more than 10 minutes, and that Claimant should be permitted to lie down in the process of the work day.

On May 14, 2001, Dr. Maguire limited Claimant as follows: no sitting for more than 2 hours per day; no walking for more than 6 hours per day; no standing for more than 4 hours per day; no reaching over his shoulders for more than 1 hour per day; no pushing over 20 pounds; no pulling over 20 pounds; no lifting over 10 pounds[15]; no climbing for more than 1/2 hour; sitting

and standing limited to 30 minutes at a time; and the ability to change positions "periodically." (ALJX 3).

I find the limitations placed on Claimant's ability to work by Dr. Maguire most persuasive because Dr. Maguire has been most closely associated with Claimant's treatment and because Dr. Maguire's restrictions are the most specific. Therefore, I find that Claimant is limited by the following restrictions: no sitting for more than 2 hours per day; no walking for more than 6 hours per day; no

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[15] This restriction appears to conflict with Dr. Maguire's statement that Claimant should be able to perform a job that requires lifting 20 to 25 pounds. (RX J, p. 29). I place more weight on this determination because Dr. Maguire made this statement on May 31, 2001, therefore, the statement was made after the limitations placed on Claimant by Dr. Maguire on May 14, 2001. *See* ALJX 3. Due to the subsequent nature of the 20 to 25 pound lifting limitation, the Court assumes that Dr. Maguire had in some way changed his opinion of May 14, 2001 that Claimant is capable of lifting only 10 pounds.

standing for more than 4 hours per day[16]; no reaching over his shoulders for more than 1 hour per day; no pushing over 20 pounds; no pulling over 20 pounds; no lifting over 20 to 25 pounds; no climbing for more than 1/2 hour; sitting and standing limited to 30 minutes at a time; and the ability to change positions periodically.

However, I also find that Claimant is capable of working a full 40 hour work week at 8 hours per day for 5 days per week.[17] I make this finding based on the fact that none of the physicians of record have limited Claimant to part-time work. Claimant himself believes that he is not capable of working this full 40 hour week. (TR 112). Ms. Elliott, a rehabilitation counselor, also believes that Claimant is incapable of working on a full-time basis. (TR 171).

Ms. Elliott bases this finding on the fact that Claimant was unable to complete a functional rehabilitation evaluation that was to occur over a 3 day period, 6 hours per day. (TR 171). Claimant was unable to complete the last 2 hours of this evaluation and therefore, Ms. Elliott find that Claimant is unable to engage in full-time employment. (TR 172). Ms. Elliott believed that Claimant would be unable to engage in full-time employment, even when faced with the opinions of all of the physicians of record that find that Claimant is capable of full-time employment. (TR 172). Because the physicians of record are better versed in Claimant's physical condition, I find their opinions entitled to more weight than Ms. Elliott's opinion. Accordingly, I find that Claimant is capable of working in full-time employment.

The next step in the analysis of whether Claimant's condition is partial rather than total is to determine whether any of the jobs identified by Respondents meet Claimant's physical limitations. Three job classifications were identified by Kathryn Melamed in here July 28, 1999 evaluation. (RX D). Ms. Melamed identified the positions of cashier, parking lot attendant, and

telemarketer. I accord less weight to this report because of the date of the report. Ms. Melamed's report predates Claimant's second surgery. Additionally, the evaluation does not identify the precise nature, terms, or availability of these positions.

However, Mr. Katzen's opinion involves more in depth interactions and research. Mr. Katzen met with Claimant on 5 occasions. (TR 20). Mr. Katzen determined that Claimant should be limited to

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[16] While Dr. Maguire's limitations on Claimant regarding standing and walking may appear to be facially inconsistent, as one cannot walk without standing, I find that the statement is consistent as standing implies that Claimant be limited from remaining in a stationary position for 4 hours, but is able to engage in movement, i.e. walking, for up to 6 hours per day.

[17] When this Court refers to "full-time work" or "full-time employment" this term is intended to reflect an 8 hour work day, 5 days per week.

light duty work based on Claimant's physical restrictions and work history. (TR 22). Mr. Katzen defines light work as "occasional 20 pounds lifting, 10 pounds lifting, more frequent general demands, but not exerting himself to a great extent and energy output." (TR 23). In rendering his opinion regarding Claimant, Mr. Katzen took into consideration the limitations placed on Claimant by Dr. Maguire. (TR 90). Based on Claimant's work history, educational level, and transferable skills, Mr. Katzen determined that Claimant could enter the light production/assembly industry at entry level. (TR 27).

Mr. Katzen authored a labor market survey dated February 28, 2001 that throughly details his employer contacts. (RX E). In that document, Mr. Katzen identified 10 potential employers that were contacted. Mr. Katzen found that 9 of these employers or employment agencies had opportunities that met Claimant's restrictions. The specifics surrounding these findings are detailed in Mr. Katzen's report as well as his hearing testimony. Several of the opportunities involve positions with employment agencies.

I do not find it significant that some of the positions identified are with employment agencies. It appears from the testimony of the vocational experts in this claim, that employment agencies are the primary way in which opportunities are located. It is only required that the precise nature, terms, and availability of the jobs be identified. The specific employer is not necessary to determine that suitable alternative employment is available.

I find the jobs listed by Mr. Katzen for Adecco, HM Electronics, Industrial Staffing and Remec to be unavailable for Claimant. While these positions appear to fit within Claimant's physical restrictions, the positions involve electronic manufacturing. For the employment agencies listed, electronic manufacturing positions are the only opportunities specifically identified by Mr. Katzen and have therefore been included in this analysis. The record appears to be relatively clear in the fact that Claimant lacks color discrimination skills. Ms. Elliott has testified that these positions usually involve the need to match colors. (TR 166-68). This opinion has not been challenged. Therefore, I find that these three potential positions are unavailable to Claimant because of his inability to discriminate between colors.

Ms. Elliott determined that Mr. Katzen had not identified any suitable alternative employment because Claimant lacks the ability to discriminate colors. (TR 166-68). I find this unpersuasive as Ms. Elliott identified that Claimant is unable to engage in electronics production because of his color discrimination inadequacies. Many of the positions identified by Mr. Katzen do not involve electronics production, but mechanical production. Therefore, as to the electronics assembly position, I find Ms. Elliott testimony persuasive. It appears from her testimony that she

is placing additional physical limitations on Claimant that were not imposed by any of the physicians of record.

Ms. Elliott stated that she would find a position to be appropriate for Claimant if Claimant "had the ability to move around and stand and sit at will, to walk around, it didn't involve any heavy lifting or overhead reaching or twisting," and involved rest breaks. Dr. Maguire limited Claimant only to no reaching over the shoulders from more than one hour per day, not a complete prohibition against this activity. Additionally, Dr. Maguire did not limit Claimant by requiring rest breaks during the day. Accordingly, I find her opinion entitled to less weight because of the additional physical limitations she has placed on Claimant.

Mr. Katzen identified Onsite, an employment agency, as possessing available positions that meet Claimant's limitations. The qualifications for the positions with this agency vary depending on the job sought. Mechanical, electronic and medical/biotech production positions were available. While electronic production positions have been deemed to be unavailable to Claimant due to his physical limitations, nothing in the record precludes Claimant from engaging in mechanical or medical/biotech production. However, Mr. Katzen was unable to determine the physical limitations for these positions. Mr. Katzen notes that the physical demands would vary depending on the position. Mr. Katzen states that a "large number of positions in the manufacturing sector fall within the light range of physical demands." I find that this statement is too speculative as to the nature of the work that would be done to consider the positions with Onsite to be available to Claimant.

Positions were also identified through Savar Consulting. (RX E). The positions with this agency involved the use of hand tools and the ability to follow verbal and written skills. It has been well documented that Claimant possesses excellent written and verbal skills. The physical demands of the positions with Savar Consulting require minimal lifting, at most 20 pounds and sometimes less. It was identified that positions were available at the time of Mr. Katzen's contact and would continue to be available in the future. Mr. Katzen also indicates that Claimant would likely be hired if Claimant sought employment through this agency. Therefore, I find that the positions available through Savar Consulting are suitable for Claimant in light of his age, experience and physical limitations.

Mr. Katzen contacted an employment agency, Express Personnel, regarding positions that may be available to Claimant. Mr. Katzen testified that the positions identified with Express Personnel were in mechanical and electronics production. (TR 38-39). Mr. Katzen determined that the positions available through Express Personnel would permit Claimant to alternate between sitting and standing in the process of the work day. (TR 38-39). The positions involve bench work and would require Claimant to lift a maximum of 20 pounds. In the February, 2001 report, Mr. Katzen indicates that positions were available at that time. In a subsequent contact with this agency, the identified positions were available in February, 2001, and not again until the middle of May, 2001. Again, Mr. Katzen found that Claimant could be hired for these positions if

he diligently sought to secure employment. I find that the positions identified by Mr. Katzen with Express Personnel are available to Claimant and are thus, suitable alternative employment.

Eastridge, an employment agency, had numerous positions available which included production opportunities that include "Packers, Machine Operators, Golf Club Assembly, and Mechanical Device Assembly." (RX E). Mr. Katzen indicated that the entry level positions available require little to no experience. It is clear that Claimant possesses at least this level of experience. Mr. Katzen specifically identified only one position with this agency that involved working for Callaway Golf Clubs. This position would require only 10-15 pounds lifting. (TR 39-41). Ms. Elliott states that the Callaway position would be inappropriate for Claimant because twisting and lifting from the waist to overhead is necessary. (TR 170-71). However, Ms. Elliott's only foundation for this comment is that she had "watched the production facilities" for Callaway Golf Clubs. (TR 170). I find this testimony less than persuasive as Ms. Elliott testified that the majority of the jobs would require twisting with no foundation as to when she observed these operations and whether the manufacturing process has changed in any way since her visit. I find that the position with Callaway Golf Clubs meets Claimant's physical restrictions, and is therefore available to Claimant.

Mr. Katzen also contacted Sony/Adecco regarding available production positions. Mechanical positions are available with this employer. A position was identified where Claimant would assemble golf clubs and the entry level position requires no experience. This is the only position with Sony/Adecco that appears to meet Claimant's limitations. The golf club manufacturing position provides the opportunity to alternate sitting and standing and requires lifting of less than 10 pounds. (TR 43-44, RX E). Mr. Katzen indicated that hiring was occurring steadily in the 1 to 2 years prior to the report with the golf club manufacturer. Therefore, I find that positions were available to Claimant in golf club manufacturing and suitable alternate employment has been identified.

Mr. Katzen also contacted two additional employers in April, 2001. (RX E). The first was Carvin Guitars. (TR 48-50). Two positions were available with Carvin Guitars at the time of the contact. These positions would permit Claimant to alternate between sitting and standing. Carvin Guitars manufactures electric guitar amplifiers and speakers. I find that these positions fit within the category of "electronics production" and are therefore not appropriate for Claimant. The other employer contacted was Chem-tronics. Mr. Katzen found that this company "fabricates and repairs components for the aerospace industry." This does not fall within the category of electronics production.

Chem-tronics requires no experience at the entry level positions. Mr. Katzen identified the position of "hand finisher" for Claimant. However, Mr. Katzen was unable to determine the lifting requirements for this position and merely states that the lifting requirements would be less than 25 to 50 pounds. Therefore, I find that this position would be inappropriate for Claimant because the lifting requirements cannot be determined.

Claimant argues that the positions with Savar Consulting are unacceptable because the jobs exceed Claimant's physical limitations. I find this argument unpersuasive. As discussed above,

positions available with Savar Consulting clearly meet the limitations placed on Claimant. Claimant also alleges that the positions with Eastridge require twisting in violation of the restrictions imposed by Dr. Maguire. There is no indication in the record that the jobs available through Eastridge identified above violate Dr. Maguire's restrictions.

Claimant also takes issue with the jobs available through Express Personnel. Claimant states that the positions available are all for electronics manufacturing positions. As discussed above, this is not the case, as indicated in Mr. Katzen's report and testimony. Therefore, I find this argument unpersuasive. Claimant also alleges that the Sony/Adecco positions violate Claimant's physical restrictions. I also find this argument unpersuasive.

Respondents have identified the existence of realistically available job opportunities that meet Claimant's physical requirements. It is sufficient that the employer show the availability of a single job to establish suitable alternative employment. *See Shiver v. United States Marine Corp., Marine Base Exch.*, 23 BRBS 246 (1990). It has also been established that the positions were available at the time of the contact, the nature of the work available, and the terms of the employment. Respondents have therefore met their burden in establishing the existence of suitable alternative employment for Claimant within the geographical area surrounding his home.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Hairston v. Todd Pacific Shipyards Corp.,* 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. Wear State Inc.*, 31 BRBS 118 (1997); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 14 BRBS 156, 165 (5th Cir. 1981); *rev'g* 5 BRBS 418 (1977). The judge does not abuse his discretion by noting a claimant's lack of diligence in seeking employment. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-37 n.7 (1985).

It has been established that Claimant pursued only one position that he located independently, and was unsuccessful in becoming employed. While Mr. Katzen stated that Claimant informed him that he would not be seeking full-time employment until his claim was resolved, (TR 59), Claimant explains that he merely wished to put off his job search until he was not "bothered with all the interruptions that are currently going on." (TR 161). Applying for one position, and stating that the search for full-time employment was being put off does not constitute diligently seeking employment. Therefore, I find that Claimant has failed to establish that he diligently sought work, a willingness to work and that he was unable to find a position.

Total disability become partial on the earliest date that the employer establishes suitable alternate employment. *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.,* 22 BRBS 155 (1989), *cert. denied,* 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991); *Harrison v. Todd Pac. Shipyards Corp.,* 21 BRBS 339 (1988); *Darden v. Newport News Shipbuilding & Dry Dock Co.,* 18 BRBS 224 (1986).

From the date of maximum medical improvement to the date suitable alternate employment is shown, the claimant's disability is total. *Stevens,* 909 F.2d at 1256. Nevertheless, an employer is not prevented from attempting to establish the existence of suitable alternative employment as of the date of an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternative employment existed on the date of maximum medical improvement. *Newport News Shipbuilding &Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Rinaldi,* 25 BRBS 128; *Jones v. Genco, Inc.,* 21 BRBS 12 (1988).

I find that Respondents have established the existence of suitable alternative employment as of February 28, 2001. While Mr. Katzen's report indicated that the opportunities were available in October, 1996, there is no indication that the positions were available at any time thereafter. Mr. Katzen's report speaks in generalities without the use of specific periods when the opportunities were available prior to February, 2001. Mr. Katzen contacted the employers listed between the dates of February 15-28, 2001. However, Mr. Katzen does not note the date on which each specific employer was contacted. No specific dates are mentioned at any point in the vocational evaluation to determine when the positions identified were available. Therefore, I find that Respondents established suitable alternate employment existed as of February 28, 2001.

Therefore, as of February 28, 2001, Claimant is considered to be permanently partially disabled. Because Claimant is considered permanently partially disabled as of that date, he is entitled to "66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. § 908(c)(21).

WAGE EARNING CAPACITY

Unscheduled permanent partial disability benefits are computed under Section 8(c)(21) by subtracting post-injury wage-earning capacity from the average weekly wage at the time of the injury. Post-injury wage-earning capacity is set by Section 8(h) at Claimant's actual post-injury earnings, if fair and reasonable; if not, the judge shall fix a fair and reasonable wage-earning capacity pursuant to the facts listed in Section 8(h) and pertinent cases. *See generally Devillier v. National Steel & Ship-building Co.,* 10 BRBS 649 (1979).

"Wage earning capacity" refers to "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.,* 22 BRBS 403,

405 (1989). Where a claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BRBS 231, 233 (1984).

Section 8(h) mandates a two-part analysis in order to determine Claimant's post-injury wage earning capacity. *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine whether Claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. If the actual wages are unrepresentative of Claimant's wage earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents Claimant's wage earning capacity.

As Claimant has no actual post-injury wage earning capacity, this does not accurately reflect Claimant's wage earning capacity. The judge must establish a precise dollar amount for post-injury wage earning capacity. *Guthrie v. Holmes & Narver, Inc.,*30 BRBS 48, 52 (1996), *rev'g on other grounds sub. nom. The Wausau Ins. Companies v. Director, OWCP,* 114 F.3d 120, 31 BRBS 41 (CRT) (9th Cir. 1997). For both parts of the wage earning capacity analysis , the judge must take a number of factors into consideration. The judge must consider Claimant's physical condition, age, education, industrial history, the number of hours worked per week, and availability of employment which he can perform after the injury. *George v. California Stevedore and Ballast Co.,* BRB No. 92-2235, 4 (Aug. 30, 1996)(unpublished); *Devillier,* 10 BRBS at 651. These factors are not exhaustive and the judge need not consider every possible factor nor assign each factor an individual monetary value, as long as the final determination of wage earning capacity is based on appropriate factors and is reasonable. *Devillier,* 10 BRBS at 661.

The ultimate objective of the "wage earning capacity formula is 'to determine the wage that would have been paid [at the time of the injury] in the open labor market under normal employment conditions to claimant as injured.'" *Randall v. Comfort Control Inc.*, 725 F.2d 791, 795, 16 BRBS 56, 61 (CRT) (D.C. Cir. 1984). The testimony of a vocational expert, as to what work Claimant can perform with his disability and what wages would be paid for this work, will often be determinative on the issue. *Devillier,* 10 BRBS at 660.

Mr. Katzen determined, in his research with the employers that he contacted, that Claimant would have earned between $6.50 and $7.50 per hour in 1996 working in the light production/assembly industry. Ms. Elliott has indicated that she believes Mr. Katzen's determination to accurately reflect Claimant's wage earning capacity in the light production/assembly in 1996. (TR 193). Therefore, taking the mean of the range listed, I find that Claimant's wage earning capacity at the time of his injury would have been $7.00 per hour, for a weekly wage of $280.00.

Applying the formula at Section 8(h), the parties have agreed that Claimant's wage earning capacity at the time of the injury in October, 1996 was $514.00 per week. Claimant's post-injury wage earning capacity is $280.00 per week, for a difference of $234.00 per week.

MEDICAL BENEFITS

"The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). For Claimant to receive medical expenses, the injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Once a Respondent is found to be liable for the payment of disability compensation benefits, that Respondent is also liable for medical expenses incurred as a result of the Claimant's injury, pursuant to Section 7(a). *Perez v. Sea-Land Servs., Inc.*, 8 BRBS 130, 140 (1978).

Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). Once a physician finds treatment necessary for the work-related condition, Claimant has established a prima facie case for compensable medical treatment. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). In order for a medical expense to be assessed against Respondent, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). It is the Respondent's burden to raise the issue of the reasonableness and necessity of the treatment. *Salusky v. Army & Air Force Exchange Service*, 2 BRBS 22, 26 (1975).

It is Respondents' duty to furnish appropriate medical care for the Claimant's back injury, "and for such period as the nature of the injury or the process of recovery may require." As such, I find that Claimant is entitled to medical benefits for such time that the nature of the injury requires.

SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the Employer to the Special Fund established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim.[18] Section 8(f) is, therefore, invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). Most frequently, the effect of Section 8(f) is to limit the Employer's liability to 104 weeks of compensation; thereafter, the Special Fund makes the compensation payments.

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[18] The Special Fund is not liable for medical benefits, even if Section 8(f) is found to be applicable . *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418 (1983), *rev'd on other grounds sub nom., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Machine Works*, 9 BRBS 198 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675 (1978).

To qualify for Section 8(f) relief, an Employer must make a three-part showing: (1) a pre-existing permanent partial disability that occurred "prior to the last injury"; (2) which is manifest to the Respondent "prior to the last injury"; and (3) the "the later disability that is the subject of the compensation claim was not due solely to the most recent injury." 33 U.S.C. § 908(f)(1); *Director, OWCP v. Cargill,* 709 F.2d 616, 619, 16 BRBS 137, 138 (CRT) (9th Cir. 1983) *(on reh'g)*.

Employer must first establish that Claimant suffered from a pre-existing permanent partial disability . The Supreme Court considered the meaning of the word "disability" as used in Section 8(f), and concluded that Congress did not intend to use "disability" as a term of art in Section 8(f). *Lawson v. Suwancee Fruit & Steamship Co.*, 336 U.S. 198, 206 (1949). Existing permanent partial disability under Section 8(f) has been defined as an

> economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

C & P Tel. Co. v. Director, OWCP (Glover), 564 F.2d 503, 512, 6 BRBS 399 (D.C. Cir. 1977); *overruled by Director, OWCP v. Cargill,* 709 F.2d 616 (9th Cir. 1983).

To qualify as "pre-existing," the condition must exist before the work-related injury; a disability which occurs simultaneously will not meet the requirement. *See Fineman v. Newport News Shipbuilding & Dry Dock, Inc.*, 27 BRBS 104 (1993) *citing Newport News Shipbuilding & Dry Dock, Inc. v. Harris*, 934 F.2d 548 (4th Cir. 1991); *Director, OWCP v. Bath Iron Works Corp., et al*, 129 F.3d 45, 31 BRBS 1555 (CRT) (1st Cir. 1997).

In order to qualify as a "pre-existing" injury under Section 8(f), the initial injury or disability must predate the second, employment related injury. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32, 37 (1992). Rather, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP,* 951 F.2d 1143, 1145-46, 15 BRBS 85 (CRT) (9th Cir. 1991); *Director, OWCP v. Belcher Erectors,* 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

The fact of a past injury is necessary for Section 8(f) relief. "There must exist, as a result of [the prior] injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director,*

OWCP, 951 F.2d 1143, 1145-46 (9th Cir. 1191); *Director, OWCP v. Belcher Erectors,* 770 F.2d 1220, 1222 (D.C. Cir. 1985). However, it is not necessary for the pre-existing disability to have caused an economic loss. *See Lawson v. Suwannee Fruit & Steamship Co.,* 336 U.S. 198 (1949); *C & P Telephone v. Director, OWCP,* 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

Employer alleges that Claimant suffered from a pre-existing injury to his back, upper extremity and neck.[19] However, Respondents make no allegation that any of these conditions were in any way disabling. Respondents cite to case law that states that "an asymptomatic disability may be sufficient to motivate an employment decision and fulfill the manifest requirement." *See* Respondents' Post-Trial Brief, *citing Director, OWCP v. Berkstressor,* 921 F.2d 306 (3rd Cir. 1990). While this is a correct citation to the case law, Respondents have failed to establish the existence of a pre-existing disability.

Respondents allege that Claimant suffered from degenerative arthritis that combined with the October 3, 1996 injury to make the disability greater. While Dr. Dodge asserted in his April 20, 1999 letter to Carrier, that the degenerative disc disease and the October 3, 1996 injury acted together to make Claimant's condition materially worse, (RX H), Dr. Dodge noted and appeared to agree with the statement made just after the October, 1996 injury, that "nothing particularly worrisome [was] wrong with [Claimant] and he could simply continue with his normal endeavors, continue on an independent exercise program for his occasional back pain, and he was released from care." (RX H).

Additionally, Dr. Dodge indicated that Claimant suffered a "simple muscle strain" on October 3, 1996. (RX H). It appears from Dr. Dodge's May, 2001 report that he is of the opinion that Claimant's condition was made worse by the surgical procedures, not by any preexisting disability. Therefore, I find that Respondents have failed to establish the existence of a preexisting partial disability. Accordingly, Respondents request for Section 8(f) relief is denied.

ATTORNEY'S FEES AND COSTS

Thirty days (30) are hereby allowed to Claimant's counsel for the submission of an application for representative's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all of the parties, including Claimant, must accompany the application. All parties have fifteen (15) days following the receipt of any such application within which to file any objections to the application.

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[19] While Respondents claim that Claimant sustained some prior disability from his motorcycle accident and neck injury, there is no evidence in the record that these conditions did not heal completely and therefore, these conditions resulted in no disability. There is no prior lasting problem due to these injuries.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record as a whole, the following shall become the final order of this court. Any specific numeric computations of the compensation award shall be performed by the District Director.

IT IS ORDERED THAT:

1. Respondents shall pay to Jerry Werelius compensation for permanent total disability due to an unscheduled disability to his back as a result of the October 3, 1996, based on the average weekly wage of $514.00 for the time period of October 3, 2000 through February 28, 2001.

2. Respondents shall pay to Jerry Werelius permanent partial disability benefits beginning on March 1, 2001 based on the Section 8(h) formula of a pre-injury average weekly wage of $514.00 and a post-injury wage earning capacity of $280.00 per week and continue until such time that Mr. Werelius' condition ceases to be permanently and partially disabling.

3. Respondents shall furnish Mr. Werelius with medical benefits for such period as the nature of the injury may require.

4. Respondents shall receive credit for all amounts of compensation previously paid to Claimant as a result of the January 9,1998 accident.

5. Respondents request for Section 8(f) relief is hereby DENIED.

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ROBERT J. LESNICK
Administrative Law Judge